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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Edwin Burilovich and Linda Burilovich
as next friends on behalf of their son,
Bradley Burilovich,

Petitioners,

v.

Board of Education of the Lincoln Consolidated Schools
and Ronald Greiner, individually,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Individuals with Disabilities Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"), requires states to provide a "free appropriate public education" to disabled children. The focal point of the Act's procedural requirements is the "individualized education program" or IEP, a personally-tailored educational program prepared at a meeting which typically includes a representative of the local education agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child. If the parties do not agree on a program, the Act provides for up to three tiers of review of the IEP: by the local education agency, with a hearing before an impartial hearing examiner; then before the state education agency; and finally in state or federal court.

The questions presented are:

1. Must the court defer to the findings and credibility determinations of the administrative hearing officer who conducted an evidentiary hearing rather than the state level review official?

2. May the court grant summary judgment based on deference to the state-level administrative decision where the underlying facts were in dispute at that level?

3. Must the court place the burden of proof on the school district?

PARTIES TO THE PROCEEDING

Petitioners

Edwin Burilovich and Linda Burilovich as next friends on behalf of their son, Bradley Burilovich. Petitioners are individuals and have no corporate affiliation.

Respondents

Board of Education of the Lincoln Consolidated Schools and Ron Greiner, individually.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, at 1a-24a) is reported at 208 F.3d 560. The decisions of the district court (App., *infra*, at 25a-65a) are unreported.

JURISDICTION

The court of appeals issued its opinion on April 4, 2000. On June 16, 2000, Justice Stevens extended the time within which to file a petition for writ of certiorari to and including August 2, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved is 20 U.S.C. § 1415(e)(2), which states in pertinent part:

> Any party aggrieved by the findings and decision * * * shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings,

> shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Additional sections of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"), and certain provisions of Michigan law, are set forth in the appendix to this petition. App., *infra*, at 256a-283a. This petition refers to the 1994 version of the IDEA, because that is the version in effect at the time that petitioners sought the programs in question.[1]

STATEMENT OF THE CASE

1. The central purpose of the Individuals with Disabilities Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"), is to ensure that children with disabilities have available to them a "free appropriate public education" that includes "special education and related services designed to meet their unique needs," 20 U.S.C. § 1400(c). The IDEA defines appropriate education as "special education and related services" provided at public expense, under public supervision and direction, in conformity with an "individualized education program" ("IEP"), and, significantly, that "meet the standards of the State educational agency." 20 U.S.C. § 1401(a)(18). The express incorporation of state laws and regulations provides

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[1] The reauthorized IDEA, which began to be implemented in 1997, left this language substantially unchanged. *See* 20 U.S.C. § 1415(i)(2)(A)-(B) (2000).

substantive content to the essentially procedural cast of the IDEA's other requirements.

Thus, although the IDEA sets forth general requirements that states must meet to qualify for receipt of federal funds, it does not prescribe specific educational programs that local schools must make available to fulfill those requirements. Instead, the IDEA establishes detailed procedural safeguards, through which individual parents may challenge the appropriateness of their child's particular educational program. The centerpiece of the IDEA's procedural requirements is the IEP, which "results in individualized consideration of and instruction for each child." *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982). The IEP includes, among other things, an assessment of the present performance of the child, goals and objectives, and the specific services to be provided. 20 U.S.C. § 1401(a)(19). Consistent with the IDEA's intention to foster cooperation between school officials and parents, this personally-tailored program must be prepared at a meeting which typically includes a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child. 20 U.S.C. § 1401(a)(20).

Where disagreements result, the IDEA entitles the parents to an "impartial due process hearing" before a hearing officer who is not an employee of the agency involved in the education of the child. 20 U.S.C. § 1415(b)(2). The IDEA mandates specific procedures for the due process hearing. All parties have the right to counsel and the advice of experts, 20 U.S.C. 1415(d)(1); to present evidence and cross examine witnesses, 20 U.S.C. 1415(d)(2); to receive a record of the hearing, 20 U.S.C. 1415(d)(3); and to receive written findings of fact and a decision, 20 U.S.C. 1415(d)(4).

States may choose either a one- or a two-tier administrative system. If the hearing initially takes place at the local level, the IDEA permits an aggrieved party to appeal to the state agency for review of the local decision. 20 U.S.C. § 1415(c). Finally, if the administrative procedures fail to resolve disagreements, the IDEA provides that an aggrieved party may bring a civil action in state or federal court. 20 U.S.C. § 1415(e)(2). The IDEA requires the court not only to receive the record of the administrative hearings, but also to hear additional evidence at the request of any party and to render a decision based on the preponderance of the evidence. *Id.* The IDEA does not specify which party has the burden of proof at any of these stages.

2. B.J. Burilovich was born on November 15, 1990. At an early age, petitioners (his parents) noticed that his language skills were significantly delayed. When he was three, petitioners sought assistance from their local school district, respondent Lincoln Consolidated Schools. B.J. was evaluated by a Multidisciplinary Evaluation Team ("MET") at Willow Run Community Schools, which was providing Preprimary Impaired ("PPI") services for Lincoln. The MET concluded that B.J. was eligible for services as a PPI student according to Michigan law. On December 17, 1993, an IEP was formulated for B.J. The IEP consisted of nonclassroom PPI services and speech and language therapy. App., *infra*, at 2a. 40a-41a.

On February 24, 1994, B.J. was evaluated by Dr. Luke Y. Tsai at the University of Michigan Adult/Child Psychiatric Hospitals. Dr. Tsai diagnosed B.J. as autistic. Petitioner Edwin Burilovich later hand-delivered a copy of Dr. Tsai's Outpatient Evaluation to Suzanne Boyer, B.J.'s teacher who attended the latter part of the appointment. The school district, however, did not classify B.J. as eligible for

the services available to children with autism. App., *infra*, at 2a, 41a.

Petitioners began researching educational approaches to the treatment of autism. They learned of an approach developed by Dr. Ivar Lovaas, based on the principles of behavioral psychology and commonly referred to as discrete trial training ("DTT"). DTT emphasizes heavy parental involvement, early intervention, and treatment in the home and elsewhere in the community, rather than in professional settings. Petitioners started a home-based DTT program for B.J. After a doctor that they consulted concluded that B.J. was an appropriate candidate for DTT, the parents requested further assistance from their school district. That request led to another IEP meeting, which produced an IEP that placed B.J. in the district's PPI program 2 ½ hours a day, four days a week, with 40-80 minutes a week of speech and language therapy. The parents requested that part of B.J.'s school time be used for DTT, but the district included no DTT in the IEP. B.J.'s teacher, Betsy McMillin, nevertheless provided DTT therapy for a half hour before the school day began. App., *infra*, at 3a, 41a-42a.

B.J.'s home program continued to develop (steadily increasing to as much as 20 hours of DTT each week) and, in the judgment of petitioners, was more effective than the program offered by the school district. Still, the next IEP meeting (in December of 1995) did not result in the provision of any DTT services as part of the official IEP. App., *infra*, at 3a-4a, 42a-43a.

Another IEP meeting was scheduled for March of 1996. Before that meeting, Dr. Meinhold (the doctor mentioned above, who had been involved with petitioners' care of their son for some time) submitted a report supporting

petitioners' view that a formal program for B.J. should include DTT. At the meeting, respondent Greiner (the Director of Special Education for the respondent school district) proposed a program consisting primarily of DTT and providing for staff training by Dr. Meinhold. At the conclusion of the meeting, however, no IEP document was prepared. The participants nonetheless adjourned with the unanimous understanding that Dr. Meinhold would begin training the staff the following week so that the services that the district had agreed to provide could be implemented. Respondent Greiner contends that he first learned some weeks later that some district staff did not support the IEP he proposed at the earlier team meeting. Respondent Greiner then met privately with his staff to develop a new IEP document. Following this private meeting, he drafted and sent to B.J.'s parents a proposal that placed B.J. in a mainstream kindergarten class and did not include any DTT. App., *infra*, at 4a-5a, 44a-46a.

Following the district's unilateral development of this new IEP document, another IEP meeting was scheduled for May 17, 1996, to which respondents did not invite Dr. Meinhold. At the meeting, petitioners expressed their concerns not only about the change of plan from that which had been unanimously agreed to at the previous IEP meeting, but also about placing B.J. in a mainstream kindergarten program without any DTT component. Respondents did not revise the IEP to assuage petitioners' concerns. App., *infra*, at 5a, 47a.

3. Petitioners requested an impartial due process hearing under 20 U.S.C. § 1415(b)(2). In preparation for the due process hearing, Dr. Meinhold observed B.J. again. Dr. Peter Holmes, a Professor of Psychology at Eastern Michigan University and an expert in behavioral psychology, also

observed B.J. A nine-day hearing was held before a local hearing officer, which included testimony on behalf of petitioners from those two clinical psychologists. The local hearing officer then issued a written decision directing the school district to implement the IEP that the district had originally proposed at the March IEP meeting. App., *infra*, at 6a, 204a-255a.

4. Respondents appealed that decision to the Michigan Department of Education. Without conducting a hearing, the state-level review officer issued a 62-page decision reversing the local hearing officer. App., *infra*, 66a-203a. He assigned the burden of proof to petitioners, even though they had prevailed at the due process hearing. App., *infra*, at 117a, 157a. He concluded that Greiner's representations at the March 1996 IEP meeting were not enforceable and that the program implemented at the May 1996 IEP meeting was substantively and procedurally valid. App., *infra*, at 6a.

5. Petitioners then instituted this action in the United States District Court for the Eastern District of Michigan. Both parties filed summary judgment motions. The district court granted summary judgment in favor of respondents. App., *infra*, at 6a-7a.

The court started from the premise that it was "to review only the SHO's decision [*i.e.*, the decision of the state-level review officer], not the local hearing officer's." App., *infra*, at 49a. It then placed the burden of proof on the parents. *Id.* It found that the parents had not met that burden because they did not establish that the school district had failed to satisfy the substantive and procedural requirements of applicable federal and state law. App., *infra*, at 51a-60a. In particular, the court found that "the District's program was

better designed to develop B.J.'s maximum potential than the more restrictive 40 hour, 1:1 program proposed by Dr. Meinhold, and thus, constituted a free appropriate public education under the IDEA." App., *infra*, at 57a.

6. The court of appeals affirmed. App., *infra*, at 2a.

With respect to the standard of review, the court noted this Court's statement in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), that courts must give "due weight" to the state administrative proceedings. App., *infra*, at 8a (quoting 458 U.S. at 206). Recognizing the "variety of interpretations" other courts of appeals have given the"due weight" standard (App., *infra*, at 9a n.1), the court of appeals adopted a standard that it described as "modified de novo review":

> [A]dministrative findings in an IDEA case may be set aside only if the evidence before the court is more likely than not to preclude the administrative decision from being justified based on the agency's presumed educational expertise, a fair estimate of the worth of the testimony, or both.

App., *infra*, at 12a.

The court of appeals also explained its view that "when there is a conflict between the holdings of the local and state hearing officers, the court must defer to the state hearing officer's decision in reviewing the record on appeal." App., *infra*, at 13a (relying on its prior holding in *Renner v. Board of Educ.*,185 F.3d 635, 641 (6th Cir. 1999)).

The court of appeals further determined that, in ruling on a summary-judgment motion,

> the court should still apply modified de novo review, but must ensure that there are no genuine issues regarding the facts essential to the hearing officer's decision. * * * In rendering its decision, the court may still rely upon the hearing officer's presumed educational expertise, as long as the material facts underlying the officer's determination are not in dispute.

App., *infra*, at 13a. Applying that standard, the court of appeals noted that the state officer had "discounted" the testimony of B.J.'s doctor. App., *infra*, at 22a. Still, the court concluded, there was no issue of fact "because the SHO's findings did take into account Dr. Meinhold's views." *Id.* Finally, the court of appeals recognized that in Michigan an IEP must be designed to develop the "maximum potential" of a child. App., *infra*, at 8a, 22a. The court of appeals recognized that there were "differing opinions on both sides as to the best program for B.J." and reasonable bases in the record for the opinions. App., *infra*, at 24a. Thus, deferring to the state-level decision, the court of appeals concluded that "the IEP was designed to allow B.J. to achieve his maximum potential." *Id.*

REASONS FOR GRANTING THE PETITION

I

The decision below that deference to state educational policy requires deference in all cases to the final administrative decision is inconsistent with traditional notions of appellate review and the purposes of the IDEA, and conflicts with decisions of other Circuits.

This case presents a question of basic importance to the litigation of disputes concerning appropriate educational planning for students with disabilities. The problem arises because of the imprecision of IDEA § 1415(e)(2), which states that a district court presented with a challenge to an IEP must "receive the records of the administrative proceedings, * * * hear additional evidence at the request of a party, and, bas[e] its decision on the preponderance of the evidence." The provision does not suggest with any clarity what level of deference the district court must accord, or to which level of the administrative process it should accord it. This Court addressed that question briefly in *Rowley*, noting that the requirement that the district court receive the state administrative record "carries with it the implied requirement that due weight shall be given to these proceedings." 458 U.S. at 206.

The court of appeals in this case concluded that the need to defer to state educational policy expertise requires deference in all cases to the final state reviewing decision. App., *infra*, at 12a-13a. In this case, that results in deference to the factual determinations of a second-tier administrative review officer – an officer who acted without hearing

testimony or taking evidence – instead of the factual determinations of a first-tier administrative officer who conducted the only evidentiary hearing that has been held with respect to petitioners' claims. By granting such deference to a purely appellate administrative process, that ruling turns on its head traditional principles of review, under which substantial deference is owed by a reviewing body (which has merely the assistance of a cold record) to credibility determinations based on a prior decision-maker's weighing of evidence, particularly when (as in this case), the evidence in question is oral testimony. For example, Rule 52(a) of the Federal Rules of Civil Procedure states: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See also Anderson v. City of Bessemer City*, 470 U.S. 564, 574-875 (1985) (noting "the superiority of the trial judge's position to make determinations of credibility," but emphasizing that deference to trial-court findings is appropriate even on issues for which credibility determinations are not dispositive).

The decision of the court of appeals also contradicts purposes evident from the structure of the IDEA. The IDEA holds out a guarantee to the parents of an "impartial due process hearing." Yet the promise of an impartial due process hearing is a hollow one if, as the court of appeals held, the parents can convince that officer of the merits of their case, only to have the factual findings ignored by all later stages of the administrative process. This problem is exacerbated when the burden of proof is placed on the parents at the subsequent stages, as it was in this case. *See infra*, part III (discussing burden-of-proof issues).

The analysis of the court of appeals is not only dubious on the merits; it also conflicts with the analysis of most of the other courts of appeals which have applied *Rowley*'s "due weight" standard. For example, in *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991), the court considered a case, like this one, in which a state hearing officer and the district court rejected the decision of a local hearing officer in favor of the parents. Among other things, the court of appeals explicitly overturned the rejection by the state hearing officer of factual findings of the local hearing officer. 953 F.2d at 104 (explaining that the state review officer concluded that one of the witnesses "saw her role as that of an advocate and found her testimony not to be credible"). *Compare* App., *infra*, at 98a ("[The state hearing officer] discounts the testimony of both, [of petitioners' doctors], finding them motivated more by a professional and/or a personal agenda."). Of particular relevance to the decision of the court of appeals in this case, the Fourth Circuit went on to explain that

> findings of fact by the hearing officers in cases such as these are entitled to be considered *prima facie* correct * * * * .
>
> We are further of opinion that when fact-findings are regularly made and entitled to *prima facie* correctness, the district court, if it is not going to follow them, is required to explain why it does not.

953 F.2d at 105.

As the Fourth Circuit noted, that decision is consistent with the decisions of several other courts of appeals. For

example, the Eighth Circuit addressed the same problem in one recent case:

> The level of deference accorded to the state proceedings is less than required under the substantial evidence test commonly applied in federal administrative law cases, but consideration should be given to the fact that the state hearing panel has had the opportunity to observe the demeanor of the witnesses. Where there is a conflict between the findings and conclusions of the hearing panel and the final reviewing officer, a court may choose to credit the hearing panel's findings based on observation of the witnesses and reject the reviewing officer's analysis if it does not appear to give sufficient weight to the views of the professional educators.

Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 610 (8th Cir. 1997).

To be sure, not all courts have adopted the *Doyle* and *Fort Zumwalt* approach. The Second and Seventh Circuits seems to have a rule similar to the rule of the Sixth Circuit. *Karl v. Board of Educ.*, 736 F.2d 873, 877 (2d Cir. 1984) ("[W]e believe *Rowley* requires that federal courts defer to the final decision of the state authorities, and that deference may not be eschewed merely because * * * the reviewing authority disagrees with the hearing officer."); *Heather S. v. Wisconsin*, 125 F.3d 1045, 1053 (7th Cir. 1997) (same; quoting *Karl*, 736 F.2d at 877). The Third and Tenth Circuits have adopted a hybrid approach, following the Fourth Circuit/Eighth Circuit rule of deference to the hearing officer for credibility-based findings, but adopting the Sixth

Circuit/Second Circuit rule of deference to the review officer for "non-credibility based findings of the hearing officer" rejected by the review officer. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 528-29 (3d Cir. 1995); *O'Toole v. Olathe Dist. Sch.*, 144 F.3d 692, 699 (10th Cir. 1998).

The Sixth Circuit's rule also is in tension with the views of courts of appeals that have considered the more general question of whether the district court should accord any deference to administrative fact findings, even in the absence of conflicting administrative determinations. In that context, the other courts of appeals generally have recognized the propriety of deferring to the ***hearing*** officer's credibility determinations. *See Burlington v. Department of Educ.*, 736 F.2d 773, 792 (1st Cir. 1984) ("The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the *hearing officer*'s resolution of each material issue.") (emphasis supplied), *aff'd sub nom. Burlington School Comm. v. Department of Educ.*, 471 U.S. 359 (1985); *Kerkam v. McKenzie*, 862 F.2d 884, 889 (D.C. Cir. 1988) (per Williams, J.) ("We will not try here to capture the appropriate deference in some formula * * * . But we think it clear that a party challenging the administrative determination must at least take on the burden of persuading the court that the *hearing officer* was wrong, and that a court upsetting the officer's decision must at least explain its basis for doing so.").

Because the decisions in *Doyle* and *Fort Zumwalt* require district courts to consider the findings of local hearing officers, and to justify any departures from those findings, they are directly contrary to the decision of the lower court in this case, which directed district courts in the Sixth Circuit to follow the lead of the district court in this case by

disregarding entirely any findings of fact that hearing officers make in such cases. That rule undermines the role of the impartial due process hearing in the statutory structure. Given the disarray discussed above, review by this Court is warranted to ensure that the lower courts provide consistent and coherent review of the administrative process.

II

The decision below that summary judgment may be based on deference to the state-level administrative decision where the underlying facts were in dispute at that level raises important and unresolved problems.

The court below recognized that the district court erred because it "apparently believed that the parties had submitted the case for review of the administrative decision on the record." App., *infra*, at 7a. The court of appeals acted, however, as if the error was not prejudicial, because it nevertheless affirmed the district court's order.

The court of appeals did state that a district court deciding summary judgment motions may still rely upon the hearing officer's expertise, as long as "there are no genuine issues regarding the facts essential to the hearing officer's decision." *Id.* The difficulty, however, intertwined with the first question presented, is that the "hearing officer" to which the court of appeals was referring was the state-level review officer, who did not in fact conduct a hearing.

Moreover, it is difficult to dispute the existence in this case of substantial disputes regarding facts "essential" even to the review officer's decision. This is evidenced most clearly by the ***review*** officer's rejection of the fact findings made by

the local-level ***hearing*** officer. The district court acknowledged the existence of opposing testimony on several of those questions, but nevertheless rejected the testimony proffered by the petitioners because the review officer had discounted it. App., *infra*, at 29a-31a, 59a-60a. Indeed (perhaps influenced by the review officer's willingness to make credibility determinations), the district court itself made findings regarding the qualifications of the school districts' witnesses. App., *infra*, at 53a-54a. The district court's conclusion makes this point best: "***After review of the evidence***, this court is ***persuaded*** that the District's program was better designed to develop B.J.'s maximum potential . . . ."[2] App., *infra*, at 57a (emphasis supplied).

It is well settled as a general matter that courts should not resolve questions regarding the credibility of witnesses on summary judgment. The Advisory Committee states in its note to the 1963 amendment to Rule 56(c) of the Federal Rules of Civil Procedure: "Where an issue as to a material fact cannot be resolved without observation of the demeanor of the witnesses in order to evaluate their credibility, summary judgment is not appropriate." *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not

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[2] The district court also made fact findings regarding many procedural issues affecting the validity of the IEP, including, among others, whether the school district promptly certified B.J. as autistic, whether the private meetings between Greiner and his staff in April 1996 were "IEP meetings," whether the IEP team had adequate qualifications, and whether the members of the IEP team adequately accounted for the progress B.J. had made after beginning his home-based DTT program. App., *infra*, at 51a-55a.

those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

Furthermore, the IDEA's particular "preponderance of the evidence" standard is rendered meaningless if district courts are allowed to grant summary judgment based on deference to the state-level administrative decision where the underlying facts were in dispute at that level. *See Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472 (9th Cir. 1993) (noting that the district court's grant of summary judgment was improper where the court rendered findings of fact on issues that had been disputed in administrative proceedings). Likewise, the IDEA's requirement that the court "hear additional evidence" would be nullified if district courts were allowed to grant summary judgment based on deference to the state-level administrative decision.[3]

A grant of summary judgment based on the district court's "review of the evidence" in this case cannot be consistent with the IDEA or Fed. R. Civ. Proc. 56. The court of appeals' affirmance of that ruling is incorrect.

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[3] In this case, petitioners presented an affidavit of Dr. Burilovich at the rehearing stage that clarified many of the factual inaccuracies in the district court's order granting summary judgment. This affidavit contained some of the information that would have been presented at trial. The district court rejected that evidence, based on its view that it was required to defer to the state-level administrative decision. App., *infra*, 28a-33a.

III

The decision below placing the burden of proof on the party challenging the IEP at every stage of the administrative and court proceedings is inconsistent with the purposes of the IDEA and conflicts with the decisions of other Circuits.

Neither *Rowley* nor the IDEA specifies which party has the burden of proof in the administrative or judicial proceedings. The court below placed the burden of proof on petitioners, as did the state review officer. Those rulings follow the consistent rulings of the Sixth Circuit, which have held that the burden of proof always rests on the party challenging the IEP.[4] *Dong v. Board of Educ.*, 197 F.3d 793, 799-800 (6th Cir. 1999). The Fifth Circuit also follows that rule. *See Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995) ("[T]he party attacking the IEP bears the burden of demonstrating its inappropriateness.").

That rule, however, conflicts with the decisions of at least four other Circuits. The Second, Eighth and Ninth

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[4] As the facts of this case demonstrate, the party challenging the IEP typically will be the parents. In this case, the parties agreed on a program acceptable to the parents that had a significant DTT component at the March 1996 IEP meeting. Before a written IEP could be prepared, the school district changed its mind and formulated a different program in a series of private meetings to which petitioners were not invited. The school district then convened a new IEP meeting, but unilaterally imposed the program it had prepared in private. Despite petitioners' assertions to the contrary, the school district ultimately was not required to prove that the March 1996 program was inappropriate.

Circuits place the burden of supporting the IEP on the schools at the administrative level. *See Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998) ("[S]chool authorities have the burden of supporting the proposed IEP."); *E.S. v. Independent School Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998) ("At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA."); *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994) ("The school clearly had the burden of proving at the administrative hearing that it complied with the IDEA.").

The Third Circuit places the burden of proof on the school district at the administrative and judicial levels. *See Carlisle Area School v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) ("In administrative and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed.") (citing *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993)). In *Oberti*, the Third Circuit explained that the purpose of the statute and practical considerations required placement of the burden of proving compliance with the IDEA's mainstreaming requirement on the school, even through the school had prevailed at the administrative level. 995 F.2d at 1219. According to the court of appeals in *Oberti*, the IDEA's express purpose — "'to assure that the rights of children with disabilities and their parents are protected'" — would be undermined if parents were required to prove that the school failed to comply with the IDEA. 995 F.2d at 1219 (quoting 20 U.S.C. § 1415(c)). It also would diminish the effect of Section 1415(e)(2), which enables parents and guardians to obtain judicial enforcement of the IDEA's substantive and procedural requirements. *Id.*

Practical considerations also motivated the court of appeals in *Oberti*. *Id.* Schools have an advantage when disputes arise, because of their better access to relevant information, greater control over the witnesses who have been involved with the child's education, and greater overall educational expertise than the parents. *Id.* (citing *Lascari v. Board of Educ.*, 116 N.J. 30; 560 A.2d 1180, 1188 (1989)).

The *Oberti* court also emphasized the language of the mainstreaming requirement, which is very similar to the substantive standard that applies in Michigan. The IDEA provides that states receiving funding under the IDEA must ensure that children with disabilities are educated with nondisabled children "to the maximum extent appropriate." 20 U.S.C. § 1412(5)(B). The Third Circuit determined that "the Act's strong presumption in favor of mainstreaming * * * would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." 995 F.2d at 1219-20.

Placing the burden of proof on the parents is particularly inappropriate in a case such as this one, because it arises in a state that has adopted an elevated standard for determining whether the state has provided a free appropriate public education.[5] Specifically, in Michigan, the programs

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[5] Michigan is not the only state that has adopted a substantive standard higher than the federal floor. *See, e.g., Burke County Board of Educ. v. Denton*, 895 F.2d 973, 983 (4th Cir. 1990) (noting that North Carolina law requires a program "ensuring that the child has an opportunity to reach her full potential commensurate with the opportunity given other children"); *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 423 (1st Cir. 1985) ("Massachusetts law mandate[s] a level of

and services must be "designed to develop the maximum potential" of the child. M.C.L. 380.1701(a), 380.1711(1), 380.1751(1) (App., *infra*, at 277a-283a).

That standard directly mandates the level of protection that (this Court concluded in *Rowley*) federal law does not require. 458 U.S. at 189. In *Rowley*, this Court held that the federal standard merely requires that school districts provide a "basic floor of opportunity" for disabled students that "consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201. The Court expressly rejected a standard that requires that states "***maximize the potential*** of handicapped children 'commensurate with the opportunity provided to other children.'" *Id.* at 189 (emphasis supplied). Justices White, Brennan and Marshall dissented on the ground that the IDEA does require "tailoring [of] each handicapped child's educational plan to enable the child 'to achieve his or her maximum potential.'" 458 U.S. at 214 (citing H.R. Rep.No. 94-332 pp. 13, 19 (1975)).

Because Michigan school districts bear a responsibility to ensure that the IEP is "designed to develop the maximum potential" of the child, it is particularly clear that the burden of proof should be on the school district. The standard is "turned on its head," as in *Oberti*, if the parents are required to prove that their child's program is not "designed to develop [the child's] maximum potential."

This problem is illustrated by the decisions of the lower courts and the state-level review officer in this case.

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substantive benefits superior to that of the federal Act.").

Rather than focusing on what type of program would be "designed to develop [B.J.'s] maximum potential," each of the decisions addresses the deficiencies in the parents' preferred program. The school district's program was accepted by default, as the only program not subject to serious examination.[6] Accordingly, placement of the burden of proof on the parents is unworkable in most IDEA cases, and especially in cases where school districts are held to standards higher than the IDEA floor.

The court of appeals suggested that the burden of proof question was "irrelevant" to the decision, because it "treat[ed] the case as submitted on summary judgment." App., *infra*, at 13a n.3. That explanation is not adequate. As this Court has explained, the standard for ruling on a motion for summary judgment necessarily implicates the substantive standard of proof that would apply at a trial on the merits. *Liberty Lobby*, Inc., 477 U.S. at 254. The court of appeals' explanation also overlooks the fact that the state review officer assigned the burden of proof to Petitioners. The assignment of the burden of proof to petitioners at the second-tier administrative level renders the district court's deference to that decision improper.

More generally, despite the claim of the court of appeals that it did not rely on the burden of proof, the opinion of the court of appeals plainly relies heavily on the

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[6] This point is demonstrated by the fact that the school district did not present any expert testimony at the due process hearing that was based on personal observation of B.J. or on the adequacy of the IEP. App., *infra*, at 22a, 56a. In contrast, petitioners presented the expert testimony of two doctors who had observed B.J. and whom the local hearing officer determined to be "well qualified." App, *infra*, at 248a.

perspective that it is petitioners' responsibility to establish a problem with the program proposed by respondents rather than respondents' task to establish that it has implemented a satisfactory program. App., *infra*, at 22a-24a. That perspective cannot be reconciled with the decisions of the Second, Third, Eighth and Ninth Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

[Filed April 4,2000]

No. 98-2187

Edwin BURILOVICH; Linda Burilovich, as next friends on behalf of their son, Bradley Burilovich, *Plaintiffs-Appellants,*	)
v.	)
BOARD OF EDUCATION OF THE LINCOLN CONSOLIDATED SCHOOLS; Ron Greiner, individually, *Defendants-Appellees.*	)

Before: KEITH, NORRIS, and CLAY, Circuit Judges.

OPINION

ALAN E. N0RRIS, Circuit Judge.

Plaintiffs Edwin Burilovich and Dr. Linda Burilovich ("plaintiffs"), acting on behalf of their autistic son Bradley ("B.J."), sued the Board of Education of the Lincoln Consolidated Schools and its special education director ("defendants") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et. seq.* Plaintiffs challenge the district court's grant of summary judgment for defendants, maintaining that a proposal to place B.J. in a mainstream kindergarten violated procedural and substantive provisions of the IDEA. For the following reasons, we affirm the judgment of the district court.

I.

B.J. was born on November 15, 1990. At an early age, his parents noticed that his language skills were significantly delayed. When he was three, plaintiffs sought assistance from their local school district, Lincoln Consolidated Schools. B.J. was evaluated by a Multi-disciplinary Evaluation Team ("MET") at Willow Run Community Schools, which was providing Preprimary Impaired ("PPI") services for Lincoln. The MET generated an Individualized Education Program ("IEP"), providing B.J. with nonclassroom PPI services, along with speech and language therapy.

On February 24, 1994, B.J. was evaluated by Dr. Luke Tsai at the University of Michigan Adult/Child Psychiatric Hospitals. Suzanne Boyer, B.J.'s teacher, was present for the last part of the appointment. Dr. Tsai diagnosed B.J. as autistic; Dr. Burilovich later hand-delivered a copy of Dr. Tsai's evaluation to Ms. Boyer. This evaluation was not placed in B.J.'s school file.

Plaintiffs began researching educational approaches to treating autism. They learned of an approach developed by Dr. Ivar Lovaas, called discrete trial training ("DTT"). DTT emphasizes heavy parental involvement, early intervention, and treatment in the home and elsewhere in the community, rather than in professional settings. Plaintiffs started a home-based DTT program for B.J.

In June 1994, Dr. Burilovich wrote to Willow Run's Superintendent, Dr. Yomtoob, expressing her concerns, about the downsizing of the Willow Run infant-toddler program and B.J.'s being given only three hours of instruction a week. That letter also indicated that B.J. was autistic.

In September 1994, Lincoln notified B.J.'s parents that it was transferring B.J. from the Willow Run program to the Lincoln, PPI program. On October 1, 1994, the parents consulted with Dr. Patricia Meinhold, a psychology professor at Western Michigan University, who concluded that B.J. was an appropriate candidate for DTT and suggested the parents request assistance from their school district. An IEP Committee meeting ("IEPC") was held with the school. The resulting IEP placed B.J. in the district's PPI program 2.5 hours a day, four days a week, with 40-80 minutes per week of speech and language therapy. The parents requested that part of B.J.'s school time be used for DTT, but the district did not include DTT in the IEP. B.J.'s teacher Betsy McMillin offered to, and did, provide DTT therapy for a half hour before the school day began.

B.J.'s home program continued to develop. By Thanksgiving he was receiving at least 20 hours per week of DTT. The parents decided to reduce B.J.'s school

participation to two days a week following Christmas vacation; his time spent on DTT increased to 20-25 hours a week. According to plaintiffs, in the first half of 1995, B.J. made progress with his language and imitative skills, but was not involved in classroom activities. By the last half of 1995, B.J. was averaging 25-30 hours of home-based DTT. On November 28, 1995, Mr. Burilovich visited B.J.'s classroom and made a videotape. The parents maintain that the behavior on the videotape confirmed Dr. Burilovich's concerns that B.J.'s behavior in school was more regressed than at home.

On July 1, 1995, defendant Ronald Greiner became the Director of Special Education for the Lincoln Consolidated Schools. He began working with the Burilovich, family in the fall of 1995 and an IEPC for B.J. was held on December 1, 1995. On December 7, 1995, Mr. Greiner sent a letter to plaintiffs memorializing conversations he had with them and setting out the district's perspective on an appropriate program for B.J. The letter also indicated that the parents had mentioned they were having some medical evaluations completed addressing autism, and asked for access to that information. In response, plaintiffs requested an independent educational evaluation ("IEE") by Dr. Meinhold. Plaintiffs later provided Mr. Greiner with a copy of Dr. Tsai's March 1994 evaluation. In January 1996, Mr. Greiner initiated an evaluation of B.J. for autism. The evaluation included some home observation by the school psychologist, school social worker, and Mr. Greiner.

Another IEPC was scheduled for March 18, 1996. Before that meeting, Dr. Meinhold submitted a report that included a formal written program proposal for B.J. At the meeting, Mr. Greiner proposed a program predominantly

consisting of DTT, accepting the goals and objectives developed by Dr. Meinhold, and providing for staff training by Dr. Meinhold. According to Mr. Greiner, he proposed the plan involving DTT because he wanted to avoid conflict and a due process hearing. The Staff, however, did not support the proposal. While most of the meeting was taped, the proposal was not written in a formal IEP. The parties disagree over the reason why there was no written document. Nonetheless, the participants left with the understanding that Dr. Meinhold would begin training the staff the next week. That training session was later canceled, according to Mr. Greiner, because of recent snow days.

After the meeting, Mr. Greiner realized that the staff did not think DTT was a good program for B.J. Mr. Greiner met privately with his staff on April 16 and 26, 1996 to discuss DTT and develop a new proposal. A proposal was drafted and sent to the parents, with goals similar to those proposed by Dr. Meinhold, but without any DTT. Instead, the proposal placed B.J. in a mainstream kindergarten class with one-to-one support from a trained paraprofessional.

An IEPC was scheduled for May 17, 1996, to which Dr. Meinhold was not invited. At the May IEPC, plaintiffs had serious concerns about, placing B.J. in a mainstream kindergarten program without any DTT and discussed why the proposal differed from the March proposal for B.J. According to defendants, Mr. Greiner tried to explain the rationale for the proposal, but the parents were not interested in hearing details. Plaintiffs signed the IEPC, noting their disagreement, on May 23, 1996.

Pursuant to the IDEA, the parents requested an impartial due process hearing before a local hearing officer ("LHO"). The LHO decided in favor of B.J.'s parents, finding that the March 1996 oral proposal was an IEP that should be implemented, and directing the district to reimburse the parents for the expenses of providing DTT at home. Both parties appealed aspects of the decision. The state hearing review officer ("SHO") reversed the LHO, finding that no IEP had been created in March and the May IEP was valid. The SHO determined that the May IEP was developed without procedural or substantive violations and provided a free appropriate public education ("FAPE") designed to maximize B.J.'s potential, in accordance with federal and state law. The SHO also denied reimbursement to the parents.

Plaintiffs filed a complaint in district court appealing the SHO's determination and alleging violations of the IDEA, the Rehabilitation Act of 1973, the Americans with Disabilities Act, 42 U.S.C. § 1983, and the Michigan Handicappers' Civil Rights Act. Defendants filed a motion for Summary judgment addressing all counts of the complaint; plaintiffs filed a motion for partial summary judgment, addressing their IDEA claim. The district court granted defendants' motion and denied plaintiffs' motions for partial summary judgment and for reconsideration. The court determined that the parents had the burden of proof. Looking at specific issues raised, the court first held that the timing of B.J.'s recertification as autistic was acceptable. Second, the court determined that the district had conducted a proper evaluation of B.J. and the professionals involved were qualified. Third, the court found that B.J.'s parents were sufficiently included in the IEPC process. Fourth, the court found that the district's proposal was designed to address

B.J.'s unique needs. Finally, after an independent review of the evidence, the court agreed with the SHO that the May IEP allowed B.J. to attain his maximum potential. Because the school's IEP was appropriate, the court held that the parents were not entitled to reimbursement. The court dismissed the remaining claims, holding that they failed because the court had found in defendants' favor as to the IEP.

The district Court apparently believed that the parties had submitted the case for review of the administrative decision on the record. Because plaintiffs dispute that the case was submitted in that manner, we will treat the cause as having been submitted on summary judgment.

II.

A. Standard of Review

The IDEA was designed to give children with disabilities a free appropriate public education designed to meet their unique needs. *See* 20 U.S.C.A. §§ 1401(a)(16), 1412 (West 1990) (current versions at 20 U.S.C.A. §§ 1401(25), 1412 (West 2000)); *See also Renner v. Board of Educ.*, 185 F.3d 635, 644 (6th Cir.1999). There are two parts to a court's inquiry in suits brought under 20 U.S.C.A. § 1415(e)(2) (West 1990) (current version at 20 U.S.C.A. § 1415(i)(2) (West 2000)). First, the court determines whether the state has complied with the procedures set forth in the IDEA. *See Board of Educ. v. Rowley*, 458 U.S.176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Second, the court assesses whether the IEP developed through the act's procedures is reasonably calculated to enable the child to receive educational benefits. *See id.* at 206-07, 102 S.Ct.

3034. Michigan has added to this standard by requiring that an IEP be designed to develop the "maximum potential" of a child. Mich. Comp. Laws. Ann. §§ 380.170(a), 380.170(a), 380.1711(17)(a), 380.1751(1) (West 1997).

This court reviews both the procedural and substantive matters under a standard of "modified de novo review." *Renner,* 185 F.3d at 641; *see Metropolitan Bd. of Pub. Educ. v. Guest*, 193 F.3d 457, 463-64 (6th Cir. 1999). This standard of review stems from the Supreme Court's holding that courts must give "due weight" to the state administrative proceedings. *Rowley* 458 U.S. at 206, 102 S.Ct. 3034. In *Rowley*, the Court looked at the procedural safeguards in the IDEA that indicated that a court "shall receive the record [sic] of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.* at 205, 102 S.Ct. 3034 (quoting 20 U.S.C.A. § 1415(e)(2) (West 1990)). The court held that "[t]he fact that § 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirements that due weight shall be given to these proceedings." *Id.* at 206, 102 S.Ct. 3034.

This court has not elaborated on the meaning of "due weight." *See, e.g., Doe v. Metropolitan Nashville Public Schools,* 133 F.3d 384, 386-87 (6th Cir.), *cert. denied*, 525 U.S. 813, 119 S.Ct. 47, 142 L.Ed.2d 36 (1998) (declining to

resolve the meaning of due weight definitively).[1] We have held that a court cannot simply adopt the state administrative findings without an independent re-examination of the evidence. *See id.* We have also indicated that the weight due will vary, depending on whether the court is reviewing procedural or substantive matters and whether educational expertise is essential to the administrative findings.

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[1] Other circuits have adopted a variety of interpretations of "due weight." *See, e.g., Adams v. Oregon,* 195 F.3d 1141, 1145 (9th Cir. 1999) (courts, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue; after, such consideration the court is free to accept or reject the findings in part or in whole, bestowing increased deference upon the hearing officer where her findings are thorough and complete); *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied,* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed.2d 1090 (1998) (the level of deference is less than required under the substantial evidence test, but consideration should be given to the State hearing panel's opportunity to observe the demeanor of the witnesses); *Teague Independent School Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993) (court's review is "virtually de novo"); *Doyle v. Arlington County School Bd.*, 953 F.2d 100, 105 (4th Cir. 1992) (findings of fact are entitled to be considered prima facie correct; the court must explain its reasons if it will not follow the findings); *Doe v. Alabama State Dep't of Educ.*, 915 F.2d 651, 657 n. 3 (11th Cir. 1990) (the extent of deference to be given the administrative findings of fact is an issue left to the discretion of the district court; the court must consider the administrative findings of fact, but is free to accept or reject them).

With regard, to procedural matters, a court, should "strictly review an IEP for procedural compliance," although technical deviations will not render an IEP invalid. *Dong v. Board of Educ.*, 197 F.3d 793, 800 (6th Cir. 1999); *see also, Doe v. Defendant I,* 898 F.2d 1186, 1190-91 (6th Cir. 1990). The Supreme Court has emphasized the importance Congress attached to the IDEA's procedural safeguards:

> [T]he congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley, 458 U.S. at 206, 102 S.Ct. 3034. Furthermore, "[i]f the procedural requirements of the IDEA are met, greater deference is to be afforded to the district's placement decision." *Dong,* 197 F.3d at 800.

As for substantive issues, "[t]he 'preponderance of the evidence' language in the [IDEA] 'is by no means an invitation to the courts, to substitute their own notions of sound educational policy for those of the school authorities which they review.'" *See Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 624 (6th Cir. 1990) (quoting *Rowley*, 458 U.S. at 206; 102 S.Ct. 3034). The Supreme Court has pointed out that:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local education agencies in cooperation with the parents or guardian of the child.

Rowley, 458 U.S. at 207, 102 S.Ct. 3034 (footnote omitted). Indeed, federal courts are generalists with no expertise in the educational needs of handicapped children and will benefit from the factfinding of a state agency, which is presumed to have expertise in the field. *See Renner,* 185 F.3d at 641; *Cleveland Heights-Univ. Heights City School Dist. v. Boss,* 144 F.3d 391, 398-99 (6th Cir. 1998) (noting that the due weight standard of review "militates against second guessing the educational expertise of the administrative officers and conclusions predicated upon these [sic] expertise").

Therefore, when reviewing an IEP we must keep in mind that the state and local educational agencies are deemed to possess expertise in education policy and practice. The focus of the Supreme Court and this court upon the presumed educational expertise of state and local agencies leads to the conclusion that the amount of weight due depends upon whether such expertise is relevant to the decision-making process. As a result, less weight is due to an agency's determinations on matters for which educational expertise is not relevant, so that a federal court would be just as well

suited to evaluate the situation. More weight is due to an agency's determinations on matters for which educational expertise would be relevant. Furthermore, while the court may not substitute its own view for that of the state and local educational agencies, *see Rowley,* 458 U.S. at 206-07, 102 S.Ct. 3034, the deference due to the administrative findings is less than that generally accorded to administrative decisions, whereby the court will uphold a decision if it is supported by "substantial evidence." *See* 5 U.S.C.A. § 706 (West 1996); *cf. Rowley,* 458 U.S. at 205, 102 S.Ct. 3034 (discussing legislative history of IDEA rejecting substantial evidence standard).

This court recently described the substantial evidence test as one in which an agency's findings would be set aside only when the record clearly precludes the administrative decision from being justified by a fair estimate of the worth of the testimony of witnesses, the agency's informed judgment on matters within its special competence, or both. *See Loral Defense Systems-Akron v. NLRB,* 200 F.3d 436, 448 (6th Cir. 1999). Because administrative findings in IDEA cases should be afforded less deference than that given to agencies under the substantial evidence test, and in view of the IDEA's preponderance of the evidence standard, we hold that administrative findings in an IDEA case may be set aside only if the evidence before the court is more likely than not to preclude the administrative decision from being justified based on the agency's presumed educational expertise, a fair estimate of the worth of the testimony, or both. A court should defer to the administrative findings only when educational expertise is relevant to those findings and the decision is reasonable. By so deferring, "due weight" will have been given to the state administrative proceedings. We

also reiterate that, when there is a conflict between the holdings of the local and state hearing officers, the court must defer to the state hearing officer's decision in reviewing the record on appeal.[2] *See Renner,* 185 F.3d at 641 (holding that court must defer to the final decision of the state authorities).

In a case involving a motion for summary judgment, the court should still apply modified de novo review, but must ensure that there are no genuine issues regarding the facts essential to the hearing officer's decision. *See Metropolitan Nashville Public Schools,* 133 F.3d at 387. In rendering its decision, the court may still rely upon the hearing officer's presumed educational expertise, as long as the material facts underlying the officer's determination are not in dispute.[3]

B. Discussion

Plaintiffs raised numerous issues in their brief. With regard to procedural matters, plaintiffs argue that an IEP was finalized in March, not May, of 1996; two meetings in April 1996 were IEPC meetings from which the parents were

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[2] Plaintiffs spent some time arguing this point in their briefs, but we see no need for further discussion in light of this court's prior holdings on this point.

[3] Because we treat this case as submitted on summary judgment, plaintiffs' arguments on appeal as to who bears the burden of proof are irrelevant. Moreover, as we recently held, the party challenging the terms of an IEP should bear the burden of proving that the placement was not appropriate, even in a case involving Michigan's maximum potential standard. *See Dong,* 197 F.3d at 799-800.

excluded; the school district failed to consult with knowledgeable professionals regarding B.J.'s placement; he was not properly evaluated; and he was not timely recertified as autistic. Plaintiffs contend that even if the procedural requirements of the IDEA were met, the IEP was substantively invalid because it failed to address B.J.'s unique needs and was not designed to allow him to attain his maximum potential. Each issue will be addressed in turn.

1. Existence of March 1996 IEP

Plaintiffs argue that the district court erred in determining that there never was a March 1996 IEP. They maintain that despite the absence of a written document the evidence shows that Mr. Greiner did not intend his proposal to be tentative and planned to implement the IEP. Federal law and Michigan regulation, however, both indicate that an IEP is a written document. *See 20* U.S.C.A. § 1401(a)(19) (West 1990) (current version at 20 U.S.C.A. § 1401(11) (West 2000)); Mich. Admin. Code r. 340.1721e (Supp. 1995). Therefore, plaintiffs cannot prevail on their claim that an IEP existed in March when there was no written document until May. Plaintiffs' suggestion that the doctrine of promissory estoppel should apply to Mr. Greiner's statements in the March meeting is equally unpersuasive. Congress created specific procedures under the IDEA for developing an IEP, which include a review process should a party such as plaintiffs be dissatisfied with the eventual IEP or the delay in creating one.

2. April 16 & 26 Meetings

Next, plaintiffs argue that they were denied meaningful parental participation in the IEPC process because they were not invited to two meetings in April 1996. *See* 34 C.F.R. § 300.345, 34 C.F.R. § 300, app. C, No. 26 (1996) (current versions at 34 C.F.R. § 300.345, 34 C.F.R. § 300, app. A, No. 5 (1999)). Defendants counter that the meetings on April 16 and 26 were staff meetings that plaintiffs were not entitled to attend. The SHO and district court agreed with defendants' characterization of the meetings and plaintiffs do little to suggest that the meetings were in fact IEP meetings. *Cf.* 34 C.F.R. § 300, app. C, No. 55 (1996) (current version at 34 C.F.R. § 300, app. A, No. 32 (1999)) (indicating that district staff may prepare information before meeting with parents). Plaintiffs have not indicated how they were prevented from participating in the development of the IEP. The parents attended a December 1996 IEPC, strongly expressed their views at the March 1996 IEPC, had the opportunity to participate in the May 1996 IEPC, and also expressed their views through letters and telephone conversations with district staff. *Cf. Dong,* 197 F.3d at 802 (finding that parents were afforded opportunity to participate, despite school district's failure to reconvene an IEPC after receiving a letter from parents, when parents attended and expressed their views at two IEPCs). Furthermore, plaintiffs have cited no support for their implicit assertion that schools may never discuss a child's IEP, goals, objectives, or educational methodology out of the presence of the parents. For these reasons, plaintiffs have failed to demonstrate that they were denied participation in the IEPC process.

3. *Qualifications of District Staff*

Plaintiffs also argue that the district failed to consult with knowledgeable professionals regarding B.J.'s placement as required by IDEA regulations. *See* 34 C.F.R. § 300.533(a)(3) (1996) (current version at 34 C.F.R § 300.533 (1999)) (requiring that the school district "[e]nsure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options"). Plaintiffs maintain that because they preferred Lovaas-style DTT therapy, at least one decision-maker should have been well-versed in that treatment. More specifically, plaintiffs argue that the district should have, but did not, consult Dr. Meinhold.

This court has rejected "the contention that [a school district] must include an expert in the particular teaching method preferred by the parents in order to satisfy the requirement that the IEPC include persons knowledgeable about 'placement options.'" *Dong,* 197 F.3d at 801; *see also Renner,* 185 F.3d at 644. Furthermore, the record indicates that Marianne Miller, a teacher consultant for the district, had experience using DTT. The district also had Dr. Meinhold's report and was able to consider it at the IEPC. *See Dong,* 197 F.3d at 801 (noting that the IEPC had a report from plaintiffs' speech therapist, who utilized DTT).

Plaintiffs also point out that the district court used the wrong standard when it found they had failed to prove "by a preponderance of the evidence" that the district's staff members were unqualified. The district court reviewed the qualifications of the district's staff and concluded that there

was "no evidence" they were unqualified. This holding indicates that plaintiffs did not meet their summary judgment burden of coming forward with evidence to create a genuine issue as to qualifications. Plaintiffs have failed to suggest on appeal how they would demonstrate a genuine issue. Therefore, while the district court cited the wrong standard, the holding was correct.

The parties also engage in a debate over whether Michigan's "maximum potential" standard requires the district to hire "top-notch consultants" and to have personnel knowledgeable about programs related to the needs of every disabled child. Because plaintiffs have failed to raise a genuine issue as to whether there were personnel knowledgeable about DTT at the meeting and failed to argue whether Dr. Meinhold would be a top-notch consultant, we decline to address the argument.

4. Evaluation of B.J. Before IEP

Plaintiffs argue that the district did not conduct a required comprehensive evaluation of B.J. before making a significant change in his placement.[4] Assuming that there was

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[4] Plaintiffs assert that the change in placement was from B.J.'s home DTT program to a fully mainstreamed school program. They cite no support for their assertion that the home DTT was B.J.'s previous placement. The record indicates that B.J. was subject to an IEP developed in October, 1994, but B.J.'s parents unilaterally reduced his school participation in 1995. On the other hand, defendants fail to explain why the change from the 1994 IEP to the 1996 IEP would not be a significant change in placement. *But cf. Dong*, 197 F.3d at 801 (noting SHO's finding that a change

a proposed significant change in placement, we must address whether the evaluation in February 1996 was adequate. Plaintiffs maintain it was inadequate because B.J. was evaluated solely for the purpose of recertification and placement options were not considered. Both the LHO and the SHO determined that the evaluation was adequate. Plaintiffs have not made a persuasive argument otherwise, especially considering the district had before it previous evaluations of B.J. and Dr. Meinhold's report. Nor have plaintiffs shown how there is a genuine issue of material fact as to whether B.J. needed a new evaluation before developing his May 1996 IEP. As the district court pointed out, B.J. was evaluated in early 1996 and "neither plaintiffs nor defendants argue that a new evaluation would have yielded different results."

5. Timely Recertification of B.J.

Plaintiffs also maintain that defendants failed to timely recertify B.J. by waiting until 1996 to certify him as autistic, even though defendants knew he was diagnosed as autistic in 1994. Defendants dispute the date they leamed of B.J.'s autism diagnosis. Plaintiffs cite the portion of the IDEA that sets out the requirements for an application for funds under the IDEA. One of the requirements is that a state or local educational agency "provide satisfactory assurance that payments . . . will be used for excess costs directly attributable to programs which . . . provide that all

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in placement from a half-day to a full-day is typical when a child turns five years of age).

children . . . who are handicapped . . . and are in need of special education and related services will be identified, located, and evaluated." 20 U.S.C.A. § 1414(a)(1)(A) (West 1990) (current version with differences in language at 20 U.S.C.A. § 1414 (West 2000)). This statutory provision does not indicate specific time periods for such evaluation. There are also no time requirements in the Michigan rule relied upon by the district court. *See* Mich. Admin. Code r. 340.1711 (Supp.1983). In relevant part, that rule states:

> "Preprimary impaired" means a child through 5 years of age whose primary impairment cannot be differentiated through existing criteria within R 340.1703 to R 340.1710 or R 340.1713 to R 340.1715 and who manifests an impairment in 1 or more areas of development equal to or greater than ½ of the expected development for chronological age, as measured by more than 1 developmental scale, which cannot be resolved by medical or nutritional intervention. This definition shall not preclude identification of a child through existing criteria within R 340.1703 to R 340.1710 or R 340.1713 to R 340.1715.

Id.

The only case cited by plaintiffs to suggest a time limitation is readily distinguishable. In *Metropolitan Nashville & Davidson County School System v. Guest*, 900 F. Supp. 905 (M.D. Tenn. 1995), the court held that a school system had violated its obligations under the IDEA to identify, locate, and evaluate children needing special

education by delaying two months in identifying a disabled child and an additional four months in properly evaluating him. The court emphasized that while the Sixth Circuit has recognized that technical defects do not result in a violation of the IDEA if there is no substantive deprivation, "[s]ix months without appropriate services, however, is one-sixth of a three-year-old's life." *Id.* at 908. That case involved the initial identification and evaluation of the child, not the reevaluation at issue with B.J. Plaintiffs maintain that the delay in this case was not just a technical defect, given the more intensive programming available for autistic students. Yet plaintiffs do not suggest how the delay could have caused a substantive problem with B.J.'s IEP, since by the time the March and May IEPCs occurred, B.J. had been certified as autistic. For these reasons, plaintiffs have failed to explain the relevance of the failure to recertify B.J. sooner, even if a time limitation was applicable.

6. B.J.'s Unique Needs

Plaintiffs suggest that the IEP failed to take B.J.'s unique needs into consideration, asserting that the district proposed the IEP because its personnel had insufficient experience for any other program.[5] To support this allegation, plaintiffs point to the testimony of Amy Stamps, the school psychologist, who indicated that the school

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[5] Although plaintiffs characterized this issue as a procedural violation, we view it as an alleged substantive violation because the requirement that the IEP be designed to meet the child's unique needs is derived from the definition of "special education" in 20 U.S.C. § 1401(a)(16). *See Dong*, 197 F.3d at 802.

personnel was not trained sufficiently to provide B.J. with DTT. Ms. Stamps' testimony does not support plaintiffs' assertion, however, because the record indicates that she still had concerns about DTT even when she assumed that personnel could be properly trained.

The district court and the SHO correctly determined that defendants' program took B.J.'s unique needs into consideration. As the district court pointed out, defendants' program set goals for B.J. and created a detailed daily schedule to address each of the goals with a program including both group instruction and one-on-one therapy. In contrast, the court noted that it did not see how the parents' proposed "standard" 40 hours of DTT therapy "was tailored to B.J.'s needs." The court later stated that the "school's proposal is the only one which took into consideration B.J.'s goals and abilities, and developed a plan specifically to accommodate him." After reviewing the record, and giving due weight to the SHO's opinion, we agree with the district court that the IEP did take into account B.J.'s unique needs. *See Renner,* 185 F.3d at 644 (determining that IEP addressed child's unique needs in case involving similar circumstances to the present case).

Plaintiffs also suggest that the IEP did not address B.J.'s unique needs because it did not mention B.J.'s home program of DTT or his potential for regression. They rely on a case in which a district court ruled against a change in placement due to a risk of regression. *See Delaware County Intermediate Unit No. 25 v. Martin K,* 831 F.Supp. 1206, 1229 (E.D. Pa. 1993). We do not read the case as saying that an IEP always will be defective if it fails specifically to

address regression, nor do plaintiffs posit any argument that would persuade this court that we should so hold.

Plaintiffs further maintain that the district court improperly resolved a material question of fact by deferring to the SHO's decision perceived by the court as discrediting plaintiffs' expert, Dr. Meinhold. Review of the SHO's opinion reveals that, while the SHO said that he discounted (not "discredited") Dr. Meinhold's testimony, the SHO actually did consider her proposed DTT package when assessing whether B.J.'s unique needs were met. There is no issue of material fact because the SHO's findings did take into account Dr. Meinhold's views. After independent review of the record, and giving due weight to the SHO's decision, we agree with the SHO's conclusion.

7. Whether the IEP was Designed to Allow B.J. to Attain his Maximum Potential

Plaintiffs maintain that there was conflicting testimony addressing the question of whether the IEP would allow B.J. to attain his "maximum potential." Plaintiffs suggest that the only expert opinion based upon a professional, individual assessment of B.J. showed that he needs an intensive program of individualized, one-to-one instruction. Plaintiffs note that defendants' expert, Dr. Gary Mesibov, had never met B.J., while plaintiffs' experts, Drs. Meinhold and Holmes, had met and observed B.J. Plaintiffs also indicate that other defense witnesses included school district staff, some of whom had never met B.J. or who had only met him once. Plaintiffs reiterate their assertion that the IEP was based on the availability of resources and experience of school personnel, not B.J.'s needs. Plaintiffs also cite several cases approving

of DTT. Finally, plaintiffs maintain that the IDEA's goal that a student be in the least restrictive environment did not weigh in favor of the district's IEP because B.J. was not ready for the fully mainstreamed class suggested by the IEP.

Independent review of the record confirms that the parties had widely differing views of the best method of education for B.J. Dr. Burilovich felt that when B.J. had less DTT, he tended to be less social, to engage in less speech, and to increase his self-stimulation. She felt he was very different in school, and that he would be totally overwhelmed in a mainstream class. Dr. Meinhold testified that B.J. would not benefit from mainstream kindergarten, even with a one-to-one paraprofessional. Dr. Holmes also indicated that DTT would be better than kindergarten for B.J., noting that B.J. would not benefit from being with peers until he developed better communication skills.

The district's witnesses, on the other hand, saw problems with DTT. Dr. Mesibov indicated that the DTT proposal emphasized B.J.'s deficits, not his strengths, and that isolating B.J. would only make his social relationships worse. Mr. Greiner stated that the staff never wanted the DTT proposal because they thought it would be bad for B.J. Some of the concerns expressed over the proposal were that DTT, unlike the school program, did not account for a natural environment, peer reinforcement, or independence. Staff members also had problems with DTT because it appeared to be a package deal, without individualization for B.J. Even Dr. Meinhold acknowledged that B.J. would learn in kindergarten, just not in his area of weakness.

The district court reviewed the testimony and concluded that the school's proposal was the only one tailored to B.J.'s needs, holding that the SHO's findings were well supported by the evidence. Given the differing opinions on both sides as to the best program for B.J. and the reasonable bases in the record for the opinions, we emphasize that courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley,* 458 U.S. at 206, 102 S.Ct. 3034. Giving due weight to the SHO's decision, we conclude that the IEP was designed to allow B.J. to achieve his maximum potential. *Cf. Renner,* 185 F.3d at 644-46 (finding IEP substantively valid under similar circumstances).

Because plaintiffs have failed to show that the IEP is inappropriate, they are not entitled to reimbursement for the costs of B.J.'s DTT program. *See School Comm. of Burlington v. Department of Educ.,* 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). Furthermore, because B.J. was offered a FAPE, the district court was correct in dismissing the remaining claims.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed September 15, 1998]

No. 97-CV-72191-DT

Edwin Burilovich, Linda Burilovich, as next friends on behalf of their son, Bradley Burilovich, *Plaintiffs,*	)
v.	)
Board of Education of the Lincoln Consolidated Schools and Ron Greiner, *Defendants.*	)

OPINION AND ORDER DENYING PLAINTIFFS' MOTION TO RECONSIDER

This matter is before the court on plaintiffs' motion to reconsider. Defendants filed a response pursuant to an order of the court. Pursuant to E.D. Mich. LR 7.1(e)(1), the court will decide this motion without a hearing.

On April 24, 1998, this court issued an Opinion and Order granting defendants' motion for summary judgment and denying plaintiffs' motion for partial summary judgment. Plaintiffs now argue that there are palpable defects by which the court and the parties have been misled which require a different disposition of this case.[1]

Plaintiffs in this matter are the parents of Bradley Burilovich, an autistic child, and appear as next friends on behalf of their son. They are suing the Board of Education for the Lincoln Consolidated Schools and Ronald Greiner, its Director of Special Education, for allegedly violating procedural and substantive portions of the Individuals with Disabilities in Education Act (the "IDEA"), the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Michigan Handicappers' Civil Rights Act, and 42 U.S.C. § 1983. In its April 24, 1998 Opinion and Order, the court set forth the facts and procedural history of this case in great

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[1] Local Rule 7.1(h)(3) provides the following:

> Generally, and without restricting the discretion of the Court, motions for rehearing and reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

E.D. Mich. LR 7.1(h)(3).

detail. See Burilovich v. Board of Education of the Lincoln Consolidated Schools and Ronald Greiner, No. 97-CV-72191, April 23, 1998, slip op., pp. 2-9 ("Opinion"). Plaintiffs now raise four separate issues for the court to reconsider, as set forth below.

I. Did the Court Give Undue Deference to the State Hearing Officer?

Plaintiffs proceeded in this matter, as required by law, through a complete administrative review of their complaint prior to filing the instant suit. Plaintiffs argue that the court gave undue deference to the State Hearing Officer's ("SHO") opinion finding in favor of defendants, especially in light of the fact that he is not a lawyer and was allegedly selected primarily because he charges fifty dollars per hour when other possible candidates charged up to one hundred dollars per hour.

Setting aside the question of the SHO's fees and expertise, contrary to plaintiffs' contention, the court used precisely the standard of deference that plaintiffs' argue for in their brief. Indeed, as support for its decision, the court quoted the same passages of the IDEA, 20 U.S.C. § 1415(e), and Doe v. Board of Education, 9 F.3d 455, 458 (6th Cir. 1993) cert. denied, 511 U.S. 1108 (1994), as plaintiffs point to in their brief.

Plaintiffs argue that the court applied a standard of "utmost deference" to the SHO's decision, rather than giving it merely "due weight," yet they cite no specific portion of the court's Opinion that might indicate excessive deference was actually given. In fact, the court conducted a careful review

of the evidence presented in this matter, as evidenced by the lengthy discussion and application of the facts presented in the April 24, 1998 Opinion and Order. The mere fact that the court affirmed the decision of the SHO does not mean that the court applied an incorrect standard of review to his findings and conclusions.

Plaintiffs' concern about the selection criteria for the SHO would be better raised in another setting, as it is not within the purview of the court to evaluate this process.

II. Did the Court Apply the Wrong Standard for Summary Judgment?

Although plaintiffs argue that the court applied the wrong standard for summary judgment, they are essentially arguing that material questions of fact remain unresolved, and summary judgment is therefore inappropriate.

Plaintiffs contend that the parties disagree over whether Bradley's May 1996 Individualized Education Program ("IEP") represented a significant change in placement for Bradley. Under 34 C.R.R. 104.35(a), the school district is required to conduct an evaluation of a child receiving special education services before implementing any "significant change in placement."

It is undisputed that the school district evaluated Bradley in January of 1996, and that a Multi-disciplinary Evaluation Team ("MET") report was issued following the evaluation. This report was used at the May 1996 Individualized Educational Planning Committee ("IEPC") meeting.

Initially, an IEPC was held on March 18, 1996, much closer in time to the evaluation, but due to a host of difficulties, no written IEP resulted from that meeting. Finally, after a series of interchanges between plaintiffs' attorney and defendant Greiner, an IEPC was held on May 17, 1996, resulting in the IEP that plaintiffs challenge in this action. It is certainly true that there was no new evaluation conducted during the intervening two months, however neither plaintiffs nor defendants argue that a new evaluation would have yielded different results. The law requires that an evaluation be done prior to a significant change in placement, but it does not set forth a strict time line for these events. Bradley was re-evaluated prior to the May 1996 IEP, and prior to the implementation of any changes in his educational plan. Given the facts of this case, the court found that the procedural requirements of the IDEA were met, and plaintiffs have presented no new evidence to convince the court that another outcome is required.

Next, plaintiffs contend that whether the May 1996 IEPC was designed to meet Bradley's "unique needs," as required by the IDEA, is a disputed question of fact. Indeed, plaintiffs and defendants presented opposing expert testimony on this question.[2] Plaintiffs introduced the testimony of Dr.

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[2] After sifting through the many issues presented in this case, now for a second time, it is again evident that this case is largely about whether a full-time DTT treatment plan or the school's combined treatment approach is most appropriate for Bradley. As discussed in the court's April 24, 1998 Opinion, DTT is a treatment method that trains an autistic child in certain behaviors through repetitive programming followed immediately by either positive or negative reinforcement. After reviewing the

testimony of all of the experts and school professionals, it is evident that there is a deep disagreement over the efficacy of DTT for treating autistic children.

On a motion for summary judgment the court is limited to applying undisputed questions of fact to the applicable law, and in an IDEA case, the court may not "substitute [its] own notions of sound educational policy for those of school authorities which they review." Board of Educ. v. Rowley, 458 U.S. 176 (1982). Some of the difficulties in this case may arise from the school's obligation under Michigan law and the IDEA to educate special education pupils in the least restrictive environment possible. See Michigan Administrative Rule 340.1722(2); Barwacz v. Michigan Dept. of Educ., 681 F. Supp. 427 (W.D. Mich. 1988). To further complicate matters, a school district is obligated to try educational plans that begin with the least restrictive environment and move to a more restrictive environment if necessary. Brimmer v. Traverse City Area Public Schools, 872 F.Supp. 447 (W.D. Mich. 1994). Thus, as the court views this case, the contested May 1996 IEP places Bradley in a school based program where he interacts with other children, while the parents strenuously object because they view home-based DTT as the only appropriate treatment for their child. Such divergent views of treatment possibilities led to a highly adversarial relationship between the parties and witnesses in this case. Still, even though the court may have a different view of how the school might have attempted to accommodate some of the parents' requests, it does not find that there are disputed questions of fact, or that the school's proposal did not provide a free and appropriate public education for Bradley in the least restrictive environment possible.

The court is aware that it may never fully appreciate the position of the parents in this case, and others like it, however the court has spent a great deal of time reviewing and rethinking this

Meinhold, who indicated that only a forty hour per week program of discreet trial therapy ("DTT") could meet Bradley's unique needs and assist him in attaining his maximum potential. Defendants presented its expert, Dr. Mesibov, and a host of school professionals, who disagreed with this assessment. Despite this opposing testimony, the court found no material question of fact because it gave due weight to the SHO's decision discrediting the opinion of Dr. Meinhold. Plaintiffs argue that the SHO's opinion on this question is worthy of no weight because he reached the same conclusion about Dr. Meinhold in another case where she apparently offered similar testimony. The court is unpersuaded that it should disregard the SHO's opinion on this question simply because he reached the same conclusion in a similar case.

Plaintiffs also argue that "[w]hether defendant Greiner intended the program he described in the March 18, 1996 IEPC to comprise an IEP and whether that program was accepted by the parties who attended" is a disputed factual issue that precludes summary judgment. In the March 18, 1996 IEPC, defendant Greiner proposed a plan for Bradley that included essentially all of the parents' requests. Defendant Greiner testified that he made this proposal in hopes that it would satisfy plaintiffs and end the dispute between the parties. However, before reducing the plan to a formal IEP, Greiner reconsidered his proposal and ultimately withdrew it in favor of the IEP produced at the May 17, 1996 IEPC.

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case to assure that all of plaintiffs concerns have been addressed.

Whether or not defendant Greiner intended the proposal he made at the March 18, 1996 IEPC to comprise an IEP, the IDEA, 20 U.S.C. § 1401(20), requires that the IEP be a *written* statement developed in an EPC. It cannot be a unilateral proposal from one member of the IEPC. Both sides in this case agree that a written IEP was never produced following the March IEPC. The question of whether defendant Greiner intended his proposal to comprise an IEP when he first introduced it is not material to this consideration. As a matter of law, in addition to being a written document, an IEP must cover a host of specific issues for each child, which precludes Greiner's March proposal from being an IEP for this child.

Plaintiffs contend there is a dispute over whether any of the materials relied upon at the May 1996 IEPC considered the issue of whether Bradley should be in a "mainstream" placement. However, the parents were present at the May 1996 IEPC, and they argued in favor of an alternative home-based treatment proposal. The parents are full members of the IEPC, and their input is to be considered along with that of school officials and other professionals. Further, plaintiffs presented Dr. Meinhold's report and recommendation regarding Bradley's educational plan. Accordingly, the court appropriately found that the question of whether the May IEPC had input on the question of Bradley's placement is not a disputed question of fact.

Finally, plaintiffs argue that there is a material question of fact over whether Bradley's condition from January through May, 1996, was "relatively static." In the April 24, 1998 Opinion, the court stated the following:

> Plaintiffs argue that an updated evaluation should have been performed prior to the IEPC; however they do not argue that a new evaluation would have yielded new results. In fact, defendants assert that BJ's condition during the intervening months was relatively static. Thus this court finds that an updated evaluation was not required, and there was no procedural violation for failure to conduct an evaluation.

Opinion, p. 12. Here, the court merely repeated what defendants *asserted,* and further stated that plaintiffs did not present evidence showing that a new evaluation would have produced a different diagnosis. In a new affidavit, Mrs. Burilovich states that her son was "continually making progress" during this period, however, she does not maintain that his diagnosis would have been anything other than autism, as the February 1996 MET found.

III. Did the Court Err in Finding that Plaintiffs Have the Burden of Proof?

In its April 24, 1998 Opinion, the court placed the burden on plaintiffs' to prove that the May 1996 IEP was not designed to meet Bradley's maximum potential pursuant to M.C.L. §§ 380.1701(a), 177(a), and 1751(1). Plaintiffs argue that even though all of the Sixth Circuit cases on this question place the burden of proof on the party challenging the IEP, none of the reported cases arose under Michigan law. Plaintiffs further contend that it is only logical for the school district to carry the burden of proof because it is the district

that has the burden of providing an IEP that is "designed to meet the maximum potential of the child."

Although plaintiffs argument is thoughtful, the court can find no Sixth Circuit precedence for shifting the burden to the school district in this matter. Defendants agree that they have the "burden" of providing an IEP that is designed to assist Bradley in meeting his maximum potential, but they argue that this is different from having a legal burden to prove that an IEP is properly designed to assist him in this manner. Although there are no reported cases addressing this question with respect to Michigan law, it is logical to the court that the party bringing the case and challenging the IEP should carry the burden of proving its inadequacies.

IV. Did the Court Err in Finding that Defendants' Failure to Reclassify Bradley as Autistic Impaired Prior to January 1996 Violated Rule 11 of the Michigan Special Education Rules?

Plaintiffs argue that the court erred when it found that defendants' failure to reclassify Bradley as autistic impaired prior to January 1996 did not violate Rule 11 of the Michigan Special Education Rules. Although the court's opinion contains only a brief discussion of this question, plaintiffs provided no new evidence or law to convince the court of their position.

Rule 11 of the Michigan Special Education Rules, R. 340.1711, states in part:

> "Preprimary impaired" means a child through 5 years of age whose primary impairment

> cannot be differentiated through existing criteria within R 340.1703 to 340.1710 or R 340.1713 and who manifests an impairment in 1 or more areas of development. . . .

Plaintiffs first contacted the school district for an evaluation of Bradley in the Fall of 1993, when Bradley was just under three years old. The school conducted an evaluation, and on December 10, 1993, a MET found Bradley eligible for services as Preprimary Impaired ("PPI"). Neither side is contending that he should have had any other evaluation at that time.

Plaintiffs next had Bradley examined by a private physician, Dr. Luke Tsai, on February 24, 1994. Dr. Tsai found that Bradley was autistic impaired and prepared a report to that effect. There is a dispute over whether the parents provided the school district with a copy of Dr. Tsai's report when it was first issued in early 1994, however it is undisputed that an IEPC was held on December 1, 1995, and DTT and other treatment plans for autism were discussed. No agreement was reached on an IEP at the December IEPC, however the district agreed to evaluate Bradley for autism, and the evaluation took place almost immediately thereafter, in January, 1996.

The Michigan rule limiting the PPI classification to children under five whose primary impairment cannot be differentiated does not require that a child be reclassified on any particular time line. Because Bradley's initial PPI classification is not being challenged, and because he was reevaluated before the March, 1996 IEPC and the May, 1996 IEP, the court finds no basis for changing its ruling on this

question. As an aside, it is interesting to note that the court's determination on this issue is in accord with that of the Local and State Hearing Officers, who both found that Rule 11 was not violated in this case.

For all of the above reasons,

IT IS ORDERED that plaintiffs' motion to reconsider the court's April 24, 1998 Opinion and Order is denied.

/s/_____
Bernard A. Friedman
United States District Judge

Dated: SEP 15 1998
Detroit, Michigan

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed April 24, 1998]

No. 97-CV-72191

Edwin Burilovich, Linda Burilovich, as next friends on behalf of their son, Bradley Burilovich, *Plaintiffs,*	)
v.	)
Board of Education of the Lincoln Consolidated Schools and Ron Greiner, *Defendants.*	)

JUDGMENT

The court has granted defendants' motion for summary judgment and has denied plaintiffs' motion for partial summary judgment. Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for defendants and against plaintiffs. Costs to be awarded in accordance with law.

JOHN P. MAYER
CLERK OF COURT

By_____
Deputy Clerk

Approved:_____
BERNARD A. FRIEDMAN
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed April ___, 1998]

No. 97-CV-72191

Edwin Burilovich, Linda Burilovich, as next friends on behalf of their son, Bradley Burilovich, *Plaintiffs,*	)
v.	)
Board of Education of the Lincoln Consolidated Schools and Ron Greiner, *Defendants.*	)

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Background

Plaintiffs in this case are Mr. Edwin and Dr. Linda Burilovich, on behalf of their 7 year old autistic child, Bradley (B.J.). Defendants are the Board of Education of the

Lincoln Consolidated Schools and Ron Greiner, the Special Education Director. Plaintiffs filed a five (5) count complaint, alleging violations of the Individuals With Disabilities Education Act (IDEA), the Rehabilitation Act of 1973, the ADA, the Michigan Handicappers' Civil Rights Act, and Section 1983. The plaintiffs' motion for partial summary judgment concerns only Count I, the IDEA claim.[1] Plaintiffs argue that this issue is ripe for summary judgment, because it is an action for judicial review of the decision of the State Hearing Review Officer (SHO), and the record below is fully developed. The Defendants' Motion for Summary Judgment addresses all five Counts of the complaint.

The IDEA was established to provide "all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1).

Facts

B.J. was born on November 15, 1990. When he turned three (3) years old, his parents noticed that his language skills were significantly delayed. His parents sought assistance from the local schools. At that time, the Willow Run Community Schools were providing Preprimary Impaired Services (PPI) for the Lincoln Consolidated Schools.

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[1] In Plaintiffs' motion they mistakenly argue that Count I of the complaint alleges both the IDEA and the Michigan Mandatory Special Education Act (MMSEA); plaintiff's complaint did not allege MMSEA violations, so that argument was improperly raised and is stricken.

B.J. was assessed by four staff members of Willow Run. On December 17, 1993, an Individualized Education Program Committee (IEPC) meeting was held and an Individualized Education Program (IEP) was generated, as required by the IDEA. This IEP identified B.J. as eligible for special education services as preprimary impaired (PPI) and provided nonclassroom PPI services and speech and language therapy. Dr. Burilovich signed the IEP in agreement.

On February 24, 1994, B.J. was evaluated by Dr. Luke Tsai of the Developmental Disorders Clinic of the University of Michigan Hospitals. Suzanne Boyer, B.J.'s teacher at Willow Run, was present for the last part of the 4 hour appointment. Dr. Tsai diagnosed B.J. as autistic. Dr. Burilovich later hand-delivered a copy of Dr. Tsai's Outpatient Evaluation to Ms. Boyer. This evaluation was not put into B.J.'s school file.

B.J.'s parents began researching the alternatives for treating autism. By March 1994, Dr. Burilovich had learned of Dr. Ivar Lovaas' work in the field. Dr. Lovaas and his associates have researched the discrete trial therapy (DTT) approach to instruction of autistic children. This approach emphasizes heavy parental involvement, early intervention, and treatment in the home and elsewhere in the community, rather than in professional settings. Plaintiffs argue that Lovaas has published the only controlled evaluations of the effectiveness of a behavioral treatment program employing intensive DTT. The most recent follow up study allegedly shows that 47% of the subjects in the group receiving DTT-based treatment (average age 13) no longer fit the diagnostic classification for autism, and instead were exhibiting test

scores indicative of "normal functioning." None of the subjects in the control group had these results.

In June 1994, Dr. Burilovich sent a letter to the Willow Run Superintendent, Dr. Yomtoob, that B.J. was autistic, and she was concerned about downsizing of the Willow Run program and the lack of intensity in B.J.'s training.

On October 1, 1994, plaintiffs met with Dr. Patricia Meinhold regarding educational programming. Dr. Meinhold concluded that B.J. was an appropriate candidate for the DTT approach and suggested that plaintiffs ask the school district for assistance in implementing a DTT program.

Prior to the 1994-95 school year, Lincoln Consolidated Schools took over the PPI program from Willow Run. Plaintiffs agreed that B.J. would attend the Lincoln PPI program, and signed the referral form. On October 5, 1994, an IEPC meeting was held and an IEP drafted which still listed B.J. as PPI, not autistic. The parents were unaware that B.J. could be recertified from PPI to autistic. Dr. Burilovich again signed the IEP, agreeing that she had received and been informed of all procedural safeguards. The Burilovichs requested at the IEPC that at least part of B.J.'s school time be used for DTT sessions. District representatives refused to include DTT in the IEP, but B.J.'s teacher Betsy McMillin offered to provide B.J. with DTT therapy one-on-one for a half hour before school. This was not in the written IEP.

B.J.'s home program continued to develop, and by Thanksgiving, he was receiving at least twenty hours of DTT a week. The parents decided to reduce B.J.'s school

participation to two days per week after Christmas break. In the first half of 1995, B.J. made progress with his expressive and receptive language skills, and with his imitative skills. Plaintiffs argue that B.J. was not making much progress in school, and that he did not yet have the necessary, skills for classroom interactions. By the last half of 1995, B.J. was averaging 25-30 hours a week in his home-based DTT program.

On July 1, 1995, Defendant Ron Greiner became the Director of Special Education for the Lincoln schools. He began working with the Burilovich family in the fall. Mr. Burilovich videotaped B.J. in class on November 28, 1995 to confirm plaintiffs' concerns that B.J.'s classroom behavior was more regressed than his home behavior. An IEPC was scheduled for December 1, 1995.

Before the December 1995 IEPC, the parents learned that the District had an obligation to provide B.J. with appropriate programming. In preparation for the IEPC, and at Greiner's request, Dr. Burilovich gave Greiner written materials describing the Lovaas research and DTT method. The parents also prepared a list of what services they felt were appropriate, and they played a videotape at the IEPC which contrasted B.J.'s performance in school with his home-based DTT sessions. The parents suggested that the IEPC use goals and objectives tailored to the DTT approach, but the District staff were resistant to this idea. Defendants claim that the Burilovichs also presented the School District with an ultimatum that B.J. would be placed in a private program if the District did not meet their demands. Defendants also state that the Burilovichs refused to discuss IEP goals for B.J. until their demands were met.

After the December 1, 1995 IEPC, both parents had conversations with Greiner. On December 7, Greiner sent them a proposal in broad outline form. The parents did not like this proposal. The parents requested an independent educational evaluation (IEE) by Dr. Meinhold. Greiner denied the request for an IEE. Parents sent Greiner a copy of Dr. Tsai's March 1994 evaluation report. The District forwarded to the parents' representative notice of the parents' procedural rights and a copy of a parent handbook.

In January 1996, Greiner initiated an evaluation of B.J. for autism. This included some home observation by the school psychologist, school social worker, and Greiner.

An IEPC meeting was scheduled for March 18, 1996. Dr. Meinhold made a formal written program proposal in a report, although she first sent Greiner a fax with proposed goals and objectives. Before the March 18 meeting, Greiner met with his staff to prepare for the meeting. The IEPC meeting lasted over 3 hours. Dr. Meinhold discussed her program and answered the staff's questions. Greiner then met privately with his staff for about a half hour. Greiner then proposed to everyone the following program:

- 35 hours of educational instruction, 30 hours of which would be provided in a discrete trial format, the balance consisting of exposure to general education

- 2 paraprofessionals and 1 back-up would implement the program, all of whom would be trained in DTT.

- The paraprofessional would work with B.J. on a one-on-one basis during his DTT sessions and during his general education exposure.

- B.J.'s parents would be invited to weekly team meetings

- The district would accept the goals and objectives developed by Dr. Meinhold

- Dr. Meinhold would train the staff and monitor the program

- An extended school year of 8-10 weeks, with 6 hours per day of DTT, and contact with non-handicapped peers

- A transition program for a home-based DTT program to a school-based DTT program, the transition to occur over an eight to ten week period.

Greiner explains that at the March 18 IEPC, he proposed a plan involving DTT, because he wanted to please the parents and avoid a due process hearing. The staff did not support the proposal. While the meeting was tape recorded, the proposal was never written down into a formal IEP. Apparently because of disputes concerning reimbursement for home, the parties left the IEPC without an IEP drafted; although the participants left with the understanding that Dr. Meinhold would begin training the staff the following week. That training session was later canceled, allegedly because the

staff could not be made available due to some recent snow days.

After that meeting, it became very clear to Greiner that the staff did not think the DTT plan was a good program for B.J. Greiner admits that he should have listened to the staff more at the March meeting, but he doesn't like conflict. Greiner stated that the more he talked with people about the Lovaas approach, the more disenchanted he became with the proposal. Tr. VI, 1042. Lincoln staff members Amy Stamps, Sherry Senunas, Lin Nichols and Betsy McMillin all told Greiner that they had concerns about the Meinhold program. Tr. VI, 1166. The staff felt that the DTT format "did not account for things like generalization, the natural environment, peer reinforcement, maximizing independence. In a sense, the discrete trial was a package. It wasn't really individualized to meet B.J.'s needs." Tr. VI, 1164-65.

Greiner met with his staff and Washtenaw ISD Consultant Marianne Miller on April 16, 1996, privately, to discuss the discrete trial training methodology. Miller noted that she found DTT useful with certain isolated behaviors, but had concerns with its use as an exclusive or effective methodology. The staff met again on April 26, 1996 to discuss and develop new goals and objectives for a new IEP. The goals and objectives were essentially those proposed by Meinhold in her most recent report. A proposal was drafted which included a daily schedule. The goals and objectives were matched with specific portions of the kindergarten day where each goal would be best addressed. The proposal was sent to the parents and their counsel on May 6, 1996. The essential elements of this proposal were:

- Placement in a full-day kindergarten for 6 & 3/4 hours a day, five days/week.

- One-to-one "support" from trained paraprofessional during the school day

- Transition into full-day kindergarten starting with all or part of the AM or PM session

- Goals and objectives as developed at the meeting held on April 26.

- Extended school year was not addressed.

The IEPC reconvened on May 17, 1996. The parents spent the majority of the meeting asking questions and expressing concerns over why the new proposal differed so much from the March proposal. The parents had serious concerns over placing B.J. in a mainstream kindergarten without any DTT component in the program. The defendants claim that Greiner attempted to explain the district's rational for the proposal, "but the parents were not interested in hearing details." Def. Motion at 5. The IEP included transitioning into the full-day kindergarten program, options for an extended school year program, team meetings (including parents) at regular intervals, and daily 1:1 support from a trained paraprofessional assigned exclusively to B.J. The parents wishes were not incorporated into the final IEP, and they signed the IEP in disagreement on May 23, 1996.

Procedural History

Pursuant to the IDEA, the parents requested a due process hearing before a Local Hearing Officer (LHO). A hearing was held before LHO Gottwald over a period of nine (9) days. The LHO rendered a decision directing the District to implement the March 18 IEP. It also required the district to reimburse B.J.'s parents for the expenses incurred in providing DTT at home from March 18, 1996 until the IEP was fully implemented.

Both parties filed appeals of aspects of this decision, and on March 14, 1997, State Hearing Review Officer (SHO) Sosnowsky issued a decision. He reversed the LHO, and determined that the May 17 IEP should be used. He found that the May IEP was developed without procedural or substantive violations, and it provided, a free appropriate public education (FAPE) designed to maximize B.J.'s potential. He placed the burden of proof on the plaintiffs, and stated that they failed to meet their burden of proving that the May IEP was deficient. In addition, the SHO asserted that the DTT package is a significantly more restrictive environment than the school's proposal, provides minimal contact with peers, does not provide communication training, and fails to provide needed related services of speech, language and occupational therapy. SHO Op. at 44. Lastly, he denied reimbursement to the parents.

Standard of Review

Under the IDEA, 20 U.S.C. § 1415(e), in its review of the SHO's decision, this court

> shall receive the records of the administrative proceedings, hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. (emphasis added)

20 U.S.C. § 1415(e)(2). The Sixth Circuit has clearly stated the standard of review for actions brought under the IDEA. This court is to perform a modified *de novo* review that gives "due weight to the state administrative proceedings in reaching [a] decision." Doe v. Bd. of Educ. of Tullahoma City Schools, 9 F.3d 455, 458 (6th Cir. 1993). This court is to review only the SHO's decision, not the local hearing officer's. This court is not to substitute its own notions of sound educational policy for those of the school authorities which are being reviewed. Id.

The party, challenging the IEP carries the burden of proving that the administrative decision was incorrect. See Hudson v. Bloomfield Hills Public Schools, 910 F. Supp. 1291 (E.D. Mich. 1995). Importantly, as the Western District of Michigan has observed, "even if it is shown that the [parent's placement] is better for [the child], that would not necessarily mean that the district's placement was inappropriate." Barwacz v. Michigan Dept. of Educ., 674 F. Supp. 1296, 1306 (W.D. Mich. 1987).

Thus, this court is to give appropriate deference to the administrative determination of the state hearing officer, listen to additional evidence (if any), and render a decision based upon the preponderance of the evidence, with the plaintiff carrying the burden.

Plaintiffs' Motion for Partial Summary Judgment

The plaintiffs argue that the SHO erred by concluding: (1) that the burden is on plaintiffs to prove that the May 17 IEP is defective; (2) that the district's IEP provided a free and appropriate public education (FAPE) for Lisa; and (3) that plaintiffs are not entitled to reimbursement for private schooling expenses.

(1) Who Has the Burden of Proof?

Plaintiffs assert that the LHO was correct when he determined that the burden was on the defendants to show that the March 18 IEP is defective. Defendants assert that the SHO was correct when he determined that the burden was on plaintiffs to show that the May 18 IEP is defective. Defendants have the stronger argument, because there never was a March IEP. Greiner merely suggested a tentative proposal, but no formal IEP was ever put in writing or signed by the parties, as required by the IDEA. Thus, the only true IEP at issue was the May 18 IEP which was rejected by the parents. The party challenging the IEP carries the burden of proving that the administrative decision was incorrect. See Hudson v. Bloomfield Hills Public Schools, 910 F. Supp. 1291 (E.D. Mich. 1995). Thus, the burden is on the plaintiff parents to prove that the May IEP was defective.

(2) Does the May IEP provide B.J. with a FAPE?

In deciding whether a school has provided a FAPE to a student with disabilities under the IDEA, a court must determine:

> (1) whether the State complied with the procedures set forth in the Act, and
> (2) whether the individualized education program developed through the Act's procedures was reasonably calculated to enable the child to realize the educational benefits as mandated by the Act.

Babb v. Knox County School System, 965 F.2d 104, 107 (6th Cir. 1992) (citing Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 206-7 (1982)). Michigan has enhanced the second part of this standard by requiring that an IEP be "designed to develop the maximum potential" of a child. MCLA § 380.1751. Federal law incorporates this higher standard. Brimmer v. Traverse City Area Schools, 872 F. Supp. 447, 452-53 (W.D. Mich. 1994). Plaintiffs argue that the school district's IEP failed to satisfy either the procedural or the substantive prong.

A. PROCEDURAL PROBLEMS

"The procedural sufficiency of the IEP is subject to strict review, but merely technical deviations do not warrant judicial interference." Brimmer, 872 F. Supp. at 449 (citing Doe v. Defendant I, 898 F.2d 1186, 1190 (6th Cir. 1990). Plaintiffs argue that the IEP was procedurally deficient in four (4) ways.

1. Recertification of B.J.

Plaintiffs argue that the District made a procedural error, because it failed to timely recertify B.J. from PPI to autistic, after the autistic diagnosis, was made. Michigan

Special Education Rule 11 addresses and defines the category of preprimary impaired. If a child is under five (5) years old and has a developmental impairment as defined in this rule, he is categorized as "preprimary impaired." This rule does not preclude the identification of a small child in other categories, such as "autistic impaired"; however, the rules do not require that the school classify, a child under five (5) as anything other than PPI. As B.J. was under five (5) years old, the diagnosis of PPI was appropriate.

2. Evaluations and Consulting Professionals who were Sufficiently Knowledgeable

Under 34 C.F.R. 104.35(a), the school district is required to conduct an evaluation of the child before the initial placement and before any "subsequent significant change in placement." It is undisputed that B.J. received an evaluation for the purpose of recertification in February 1996. After the evaluation, a multidisciplinary evaluation team (MET) report was issued. The team was comprised of Defendant Greiner, Sherry Senunas, SSW and Mary Lupini, school psychologist. Their report summarized B.J.'s status, and this evaluation report was utilized at the May 1996 IEPC meeting.

Plaintiffs argue that an updated evaluation should have been performed prior to the IEPC; however they do not argue that a new evaluation would have yielded new results. In fact, defendants assert that B.J.'s condition during the intervening months was relatively static. Thus, this court finds that an updated evaluation was not required, and there was no procedural violation for failure to conduct an evaluation.

The IDEA regulations also require that the placement decision be "made by a group of persons which must include persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 C.F.R. 300.533(a)(3). Plaintiffs assert that the district's team was unqualified to recommend placement options for B.J., and that the failure to have Dr. Meinhold at the IEPC meeting was a procedural error.

First, plaintiffs fail to prove by the preponderance of the evidence that the district's staff members were unqualified. In fact, Washtenaw ISD Teacher Consultant Marianne Miller, who facilitated the process, had years of experience working with autistic children, and had previously utilized intensive DTT with autistic students. Lin Nichols, the school speech and language therapist, provided therapy to B.J. three (3) times per week, participated in B.J.'s initial MET evaluation, had attended several workshops on DTT, and had experience working with autistic children. Amy Stamps, the school psychologist, had worked with autistic children for 5 years and was a participant in B.J.'s initial evaluation and first MET. She has studied behavior modification in two courses and has designed 10 behavioral modification programs. Also testifying in favor of the school's approach were school social worker Sherry Senunas and Washtenaw ISD teacher consultant Debra Dorenkamp. In combination, these people have significant experience working with autistic children. They clearly expressed their opinions and reasons to Mr. Greiner as to why the daily scheduling program would be better for B.J. than 40 hours of DTT. The staff felt that the DTT format "did not account for things like generalization, the natural environment, peer reinforcement, maximizing independence. In a sense, the

discrete trial was a package. It wasn't really individualized to meet B.J.'s needs." Tr. VI, 1164-65. There is no evidence that they were unqualified to assess B.J.'s needs or which program would be appropriate.

Second, plaintiffs correctly assert that a school district violates the IDEA if it fails to secure and consider the recommendations of those most knowledgeable about the student. However, in this case, the teacher and parents were consulted, and they knew B.J. best. Dr. Meinhold had only observed B.J. on three (3) occasions. Furthermore, Dr. Meinhold's recommendation was secured in the form of a report which was evaluated by the IEPC. Meinhold's views were presented and considered, even though she was not present. Thus, plaintiffs' argument regarding lack of knowledgable people is without merit.

3. Inclusion of B.J.'s Parents in the IEPC Process

Plaintiffs argue that the parents were not sufficiently included in the IEPC process. Plaintiffs support the LHO's decision that the District should have invited the parents to the meetings held by district staff on April 15 and 26, 1996, at which proposals were discussed. However, this court affirms the SHO's decision that the district was not obligated to invite the parents to participate in these meetings.

Greiner met with his staff and Washtenaw ISD Consultant Marianne Miller on April 16, 1996, privately, to discuss the discrete trial training methodology. The staff met again on April 26, 1996, to discuss and develop new goals and objectives for a new IEP. The goals and objectives were essentially those proposed by Meinhold in her most recent

report. These were not IEPC meetings, but staff meetings. A proposal was drafted and sent to the parents and their counsel on May 6, 1996. The parents were able to fully express their opinions at the May 17, 1996 IEPC meeting.

The parents have produced no support for their assertion that they are entitled to attend all staff meetings which concern their child. The parents were fully involved in the process, and at every, step were able to express their preferences. While the district did not agree with their proposal, parents are only entitled to participate in the process; they do not have the right to mandate what type of program their child will attend. Lachman v. Illinois State Board Of Ed., 852 F.2d 290, 297 (7th Cir. 1988), citing Board of Ed. v. Rowley, 458 U.S. 176 (1982).

4. Addressing B.J.'s Individual Needs

Plaintiffs argue that the district's proposal to mainstream B.J. did not take into consideration B.J.'s unique characteristics and limited educational experience. This is disproved by the evidence. In fact, at the staff meeting on April 26, 1996, goals were set for B.J., and a detailed daily schedule was created for B.J. to address each of those goals. The program was to include both group instruction and one-on-one therapy.

Conversely, the parents' proposal involved a standard forty (40) hours per week of DTT therapy at home. This court does not see how this proposal was tailored to B.J.'s needs.

B. SUBSTANTIVE PROBLEMS

1. Does the IEP Allow B.J. to Attain his Maximum Potential? AND Will the Parents' Program Allow B.J. to Attain his Maximum Potential?

Michigan requires that an IEP be designed to develop the maximum potential of a child. "Maximum potential" has not been defined by the legislature; the standard depends on the unique facts and circumstances of each case.

Dr. Meinhold and Dr. Holmes clearly stated their opinion that only a 40-hour per week DTT program would permit B.J. to attain his maximum potential. Both doctors had observed B.J., and both had a considerable amount of experience with autistic children and the DTT behavioral intervention method. Both testified their opinion that B.J. was not ready for mainstream kindergarten. Plaintiff argues that these opinions were unrebutted, because the district produced no expert witness who could rebut the recommendations of Drs. Meinhold and Holmes as to B.J.'s "unique needs." Plaintiffs argue that the district's expert, Dr. Gary Mesibov, did not have sufficient information to evaluate the district's program, because Mesibov never personally observed B.J. However, the district presented numerous other qualified witnesses who had worked with B.J. who asserted that the daily schedule program in the IEP was more appropriate than DTT therapy.

The district's program was designed by the staff specifically with B.J.'s goals in mind. The program includes some one-on-one training in behavioral management with a

paraprofessional; support from teacher consultants; daily speech therapy; weekly occupational therapy; and regular team meetings with the staff and parents. The parties had similar goals and objectives for B.J., but they disagree on how to reach those goals. The primary responsibility for choosing the appropriate educational method for a child is with the state and local school officials. Barnett v. Fairfax County School Bd., 927 F.2d 146, 152 (4th Cir. 1991), citing Rowley, 458 U.S. at 207-8. Again, the court does not see how the plaintiffs' 40 hours per week of DTT proposal is tailored to B.J.'s needs. The school's proposal is the only one which took into consideration B.J.'s goals and abilities, and developed a plan specifically to accommodate him. The school's proposal is the only one which will place B.J. in a group setting where he can interact with other children, both handicapped and non-handicapped. After review of the evidence, this court is persuaded that the District's program was better designed to develop B.J.'s maximum potential than the more restrictive 40 hour, 1:1, DTT program proposed by Dr. Meinhold, and thus, constituted a free appropriate public education under the IDEA. The SHO's findings were well supported by the evidence in the record, and "findings of fact by a hearing officer made in a regular manner and with evidentiary support are entitled to presumptive validity." Doyle v. Arlington County School Bd., 953 F.2d 100, 105 (4th Cir. 1991).

2. Methodologies

The SHO concluded that DTT is a methodology that the district was not required to include in the IEP. Plaintiffs argue that this discussion of methodology was misplaced and tainted the outcome of the proceedings. They argue that SHO

must first determine if the IEP provides the child with a FAPE. If no FAPE is proposed, then methodology is irrelevant. So, the SHO prematurely and improperly discussed methodology without first determining that a FAPE was proposed.

Plaintiffs' argument lacks merit. While the SHO does discuss teaching methods, they were appropriately raised within context. In determining whether the plan proposed by the school constitutes a FAPE from a substantive viewpoint, it is necessary to look at the teaching methods proposed by the school. If the SHO finds that this method or program is appropriate for this child and would permit him to attain his maximum potential, then the plan constitutes a free appropriate public education. The SHO clearly analyzed the IEP as to its substantive and procedural accuracy, and found that a FAPE was proposed. Plaintiffs have failed to meet their burden of proving that the IEP lacked FAPE. Any discussion of methodology, which was minimal, is not cause for reversal, as it was appropriate within context.

3. Application of LRE Principles

The IDEA requires states to ensure that handicapped children are educated in the least restricted environment (LRE). In other words, handicapped children should be educated to the maximum extent appropriate with children who are non-handicapped. 20 U.S.C. § 1412(5)(B). Only the district's proposal included interaction with other children. The parents' proposal asserts that forty (40) hours of one-on-one DTT therapy is appropriate for B.J. Plaintiffs incorrectly assert that the LRE principle should not apply to B.J., and that it is not appropriate for B.J. to mainstream with non-

handicapped children at this stage. Their only support for this assertion is Mr. X v. New York State Education Dept., 975 F.Supp. 546 (S.D.N.Y. 1997), a case which plaintiffs claim support their idea that home DTT programs are more appropriate for autistic children than school placement. However, that case is distinguishable from the case at bar. First, in that case, the school district agreed that home-based therapy was the best method for the child, but they believed they lacked funding. In the case at bar, the school district staff firmly believes that school-based training would be more appropriate for B.J. Second, unlike B.J.'s case, in Mr. X the school program did not have an aide who could work with the child one-on-one. Lastly, every student must be addressed on an individual basis. Mr. X certainly did not stand for the proposition that DTT home-based therapy is best for all autistic children. In this case, the school based program is appropriate, and the LRE principles of the IDEA apply and weigh in favor of the district's proposal.

4. Credibility Determinations

Plaintiffs argue in their reply brief that the SHO erred in making credibility determinations of plaintiffs' witnesses that were contrary, to the LHO's determinations. See Doyle, 953 F.2d at 105. Specifically, plaintiffs allege that the SHO's discounting of the testimoney of Drs. Meinthold and Holmes was error. However, in Doyle, the SHO made credibility determinations that were completely different from those of the LHO, when only the LHO had observed the witnesses, in this case, the LHO merely stated that these doctors were "well qualified witnesses" who gave strong testimony in support of DTT. LHO Op. at 33. The SHO's determined that these witnesses may have professional or personal

agendas, so he discounted their testimony. This is not in conflict with the LHO's decision, and thus does not fall under the decision in Doyle. The SHO is allowed to make credibility determinations, so long as he has a basis, and the determinations are not contrary to those of the LHO who personally observed the parties.

Assuming, *arguendo,* that plaintiffs were correct in stating that the SHO should not have made credibility determinations, the error was harmless. Irrespective of the testimony of plaintiffs' experts, the SHO found that the district's IEP provided a FAPE. The credibilty of plaintiffs' witnesses was not relevant to that determination. Thus, the SHO would have reached the same result, even if he had not assessed the weight of Meinhold and Holmes' testimony.

(3) Are the Parents Entitled to Reimbursement for In-Home DTT Therapy?

The Supreme Court has ruled that reimbursement to parents for the expenses of private education is available if: (a) the placement proposed by the school in an IEP is determined to be inappropriate; and (b) the alternative placement into which the parents place their child is appropriate. School Committee of Burlington v. Dept. of Educ., 471 U.S. 359, 370 (1985). Since the IEP proposed by the Lincoln Consolidated Schools has been determined appropriate, the parents are not entitled to reimbursement.

Defendants' Motion for Summary Judgment

As the issue of Count I has been resolved above in Defendant's favor, now Counts II-V will be addressed

pursuant to Defendants' Motion for Summary Judgment. As stated above, these counts alleged violations of the Rehabilitation Act of 1973, the ADA, Section 1983, and the Michigan Handicappers' Civil Rights Act.

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if:

> the pleadings, depositions, answers, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. . . .

In responding to a properly supported summary judgment motion, the burden is on the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R.Civ. P. 56(e). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine dispute as to any material fact." Anderson v Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986).[2] Viewing the evidence in a light most

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[2] In Liberty Lobby, the Supreme Court defined a "genuine" dispute as one that must be resolved by the fact-finder at trial because, based on the evidence submitted by both parties, "a reasonable jury could return a verdict for the non-moving party." 477 U.S. at 248. Thus, a dispute is not "genuine" if the evidence is such that, were the matter to proceed to trial, the party seeking summary judgment would be entitled to a directed verdict, Id., citing 10A Wright & Miller, Federal Practice and Procedure

favorable to the non-moving party, Addickes v S.H. Kress, Co., 398 U.S. 144, 157 (1970), summary judgment should be entered if the evidence is such that a reasonable fact-finder could not find for the non-moving party. See, e.g., Celotex Corp. v Catrett, 477 U.S. 317, 322-324 (1986); Street v J.C. Bradford & Co., 886 F.2d 1472, 1478-1480 (6th Cir. 1989).

Rehabilitation Act of 1973 and ADA

Plaintiffs' complaint alleges violations of Section 504 of the Rehabilitation Act of 1973 and the ADA. The elements of a Section 504 prima facie case are: (l) plaintiff is handicapped, as defined by the Act; (2) he is "otherwise qualified" for the program; (3) he is excluded from benefits solely because of his handicap; and (4) the program or special service receives federal funding. See Mrs. C. V. Wheaton, 916 F.2d 69, 74 (2nd Cir. 1990). There is no question in the case at bar that B.J. is handicapped as defined by the Act, that he is qualified for special education, and that the school district receives federal funding. However, in light of this court's decision that the IEP offered to B.J. in May 1996 proposed a free appropriate public education, this court fails to see how B.J. was excluded from any benefits solely because of his handicap. B.J. was offered benefits, which plaintiffs chose to reject. Defendants did not discriminate against B.J. in violation of the Rehabilitation Act.

Similarly, Title II of the ADA requires that an individual claiming a violation of the Act demonstrate that he

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§ 2725, pp. 93-95 (1983).

was being discriminated against or excluded from programs on the basis of his disability. 42 U.S.C. § 12132; see McPherson v. Michigan High School Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997). Plaintiffs have not established that B.J. was excluded from services because of his handicap. Thus, plaintiff's ADA claim must fail.

Michigan Handicappers' Civil Rights Act (MHCRA)

The prima facie elements of a MHCRA claim are: (1) that plaintiff is handicapped within the meaning of the Act; (2) that he or she is qualified for the educational opportunity sought, in spite of the handicap; and (3) that, in spite of those qualifications, he or she is not being afforded an equal opportunity to secure the educational opportunity as others. Crancer v. Bd. of Regents, 156 Mich. App. 790, 795 (1986).

B.J. was provided with an opportunity, but his parents did not like what was offered. The parents are entitled to their opinion as to what is best for their child; however, the fact that plaintiffs did not like the IEP does not constitute discrimination. Plaintiffs failed to establish a prima facie case of discrimination under the MHCRA.

Section 1983

A Section 1983 claim can only exist if there has been a violation of a plaintiff's rights or privileges. 42 U.S.C. § 1983. Because there has been no violation of rights (plaintiff failed to establish a claim under any of the above statutes), there can be no Section 1983 violation. See Maine

v. Thiboutot, 448 U.S. 1 (1980) (section 1983 cause of action is derivative of other federal rights). Plaintiff predicated his Section 1983 claim on violations of the IDEA, § 504 of the Rehabilitation Act, and thes ADA. Like those claims, the Section 1983 claim must fail.

CONCLUSION

Plaintiffs' motion for a partial summary judgment motion is denied. This court has give appropriate deference to the administrative determination of the state hearing officer, and rendered a decision based upon the preponderance of the evidence. The court has evaluated both the procedural and substantive arguments presented by plaintiffs. Plaintiffs have failed to meet their burden of proving that the State Hearing Officer's decision was erroneous. Because the school's program has been determined to be appropriate, the parents are not entitled to reimbursement for the home-based DTT therapy.

Defendants' motion for summary, judgment is granted. As discussed above, none of plaintiffs' claims can survive. There are no facts which would support a claim for violation of the IDEA or disability discrimination by the Defendants. Accordingly,

IT IS ORDERED that plaintiffs' motion for partial summary judgment is denied.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted.

/s/_____
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: 4/24/98
Detroit, Michigan

Copies sent this date to: Richard a. Landau and Michael A. Eschelbach

APPENDIX D

STATE OF MICHIGAN

CASE NO. H-0298-96

STATE LEVEL HEARING REVIEW

IN THE MATTER OF	)
BRADLEY BURILOVICH	)
Appellant-Petitioner	)
	)
v.	)
	)
BOARD OF EDUCATION OF THE	)
LINCOLN CONSOLIDATED SCHOOLS	)
Appellant-Respondent	)
	)

DECISION

William P. Sosnowsky
State Hearing Review Officer
14 March 1997

ABBREVIATIONS

1:1	ratio of paraprofessional to pupil; equivalent of total individualization.
LCSD:	Lincoln Consolidated School District.
AI:	autistically impaired; autism.

c.:	circa.
CA:	chronological age.
DTT:	discrete trial training methodology.
FAPE:	free, appropriate, public education.
IDEA:	INDIVIDUALS WITH DISABILITiES EDUCATION ACT.
lEE:	independent educational evaluation.
IEP:	individualized education program.
IEPC:	individualized educational planning committee.
LHO:	local hearing officer.
LRE:	least restrictive environment.
MAC:	Michigan Administrative Code.
MDE:	Michigan Department of Education, or Department.
MMSEA:	Michigan Mandatory Special Education Act
MET:	multi-disciplinary evaluation team.
OCR:	Office of Civil Rights.
OSE:	Office of Special Education.
OT:	occupational therapist.
Ps:	Petitioners.
PDD:	pervasive developmental disorders.
PPI:	pre-primary impaired.
R:	Respondent (school district).
SBE:	State Board of Education.
MSER(s):	Michigan Special Education Rule(s).
SHRO:	state hearing review officer.
SSW:	school social worker.
SY:	school year.
UM:	University of Michigan.
WISD:	Washtenaw Intermediate School District.

CITATIONS

Testimony / Transcript:	(T-I through T-2043) 9-volume transcript - paginated serially, pp 1-2043.
Petitioners' exhibits:	(P-1 through P##): exhibits are numbered and Bates paginated (serially) 1-319.
Respondent exhibits:	(R-I through R##): exhibits are numbered and individually paginated.
LHO exhibits:	(HO-la to HO-20).
SHRO exhibits:	(SHRO-I to SHRO-15).

GRAVAMEN

The fundamental questions for review are fourfold: 1) Did Respondent follow procedural safeguards in the development of the IEP?; 2) Does the disputed IEP provide FAPE for B J?; 3) Is methodology at issue? 4) Are Petitioners due reimbursement for their expenses for the home DTT program for B J? Not at issue are 1) BJ's IEPC determination of autism; 2) his eligibility for special education and related services; 3) the nature and condition of autism or of children with autism in general (T-30).

SYNOPSIS

BRADLEY BURILOVICH (BJ) is now 6 years and 3 months old (d.o.b. 11/15/90). He is a resident of the Lincoln Consolidated School District (LCSD), a constituent district

of the Washtenaw Intermediate School District (WISD). His diagnosis is autism (per DSM-IV), and his special educational category is "autism" (Michigan Special Education Rule 15 (MSER 15), "a lifelong developmental disability which is typically manifested before 30 months of age."). He is barely verbal (T-545,593), not toilet trained, low functioning (T-545), and exhibits self-stimulatory behavior. Petitioners voluntarily and unilaterally withdrew BJ from the PPI program c.11-29-95. His stay-put IEP (MSER 25c(l)) of 10-05-94 (P-6; R-6), requires placement in the PPI program with a related service consisting of speech and language therapy. Petitioners have progressively adjusted BJ's placement reductively as they increased a home program of discrete trial training (DTT). At this time BJ's entire educational program consists of a home DTT program administered by Petitioners and other non-professional trainers. Petitioners have not sought the latter available therapies from Respondent. All actions by Petitioners were done unilaterally and voluntarily.

BJ had initially been determined by an individualized education planning committee (IEPC) to be preprimary impaired (PPI). The resulting individualized educational program (IEP) placement was a PPI classroom program, first in the Willow Run School district (in consortium relationship with LCSD), and then in the LCSD (which undertook its own PPI programming).

A meeting preliminary to the annual review of BJ's IEP of 10-05-94 (now the stay-put IEP), was scheduled for 11-10-95, but postponed by Petitioners. Subsequently, an IEPC meeting (the first of three) was convened on 12-01-95, at which time Petitioners laid out programmatic, methodological, and

reimbursement demands (P-11), and refused to consider Respondent's programmatic alternatives for an IEP. No IEP resulted. There followed a request for an IEE (12-28-96) which was approved after first being refused by Respondent.

The second IEPC meeting (of a series of 3) was reconvened (3-18-96) at which Respondent accepted Petitioners' goals and objectives as well as a preponderance of their respective programmatic specifications including DTT. When Respondent proceeded to formalize in writing on an official IEP form, Petitioners raised the issue of reimbursement, but without presenting any documentation regarding an accounting of expenses. With that, they continued to refuse consideration of the formalization of the proposed programmatic elements for the IEP until reimbursement was resolved. No IEP resulted.

Subsequent to the meeting Respondent issued a broadly outlined proposal to Petitioners' attorney, and invited a response thereto. The proposal included the previously agreed upon goals and objectives, and a program to be effected within a kindergarten classroom program with a paraprofessional for BJ's exclusive 1:1 support, as well as other related services. The latter proposal was followed with the third session (on 5-17-96) of the IEPC meeting that was begun on 12-01-96. The duration of the disputed IEP (P-29, ppl17, 118) is 33 days, 5-19-96 through 6-19-96. The IEP provided the following support services: 1) Psych .1701: 2) team meetings; 3) SSW .1701c: team meetings; 4) S/L .170lc: daily contact minimum 25 minutes a day, w/ emphasis on skill acquisition w/paraprofessional; 5) TC / WISD . 1749: consultation, minimum 4x, 15 minutes; 6) TC .1749:

consultation; 7) OT .1701c: direct lx / week, 15 minutes; 8) OT .170lC: consultation 1x / week 15 minutes minimum. At this time BJ was 5 years and 6 months old. All three IEPC meetings were adversarial. Exchanges of communications by telephone, letter, and facsimile, were variously made between Respondent, directly with Petitioners, directly with Petitioners' attorney, and directly with Petitioners' independent evaluator occurred between these several events. On 5-23-96, Petitioners in disagreement with the resulting IEP (the disputed IEP), on 5-23-96, requested a due process hearing.

A closed hearing was held in 9 sessions (9-09-96 thru 10-01-96). The decision was rendered on 10-29-96). On the issues before him, the LHO held as follows:

> Issue 0l: LCSD evaluations are appropriate; no violation.
> Issue 2.1: Petitioners properly notified of procedural rights: no violation.
> Issue 2.2: Respondent recertified BJ timely and appropriately; no violation.
> Issue 2.3: Failure to include and involve parents in the IEPC process; violation.
>
> > Order: a) IEP invalidated.
> > Order: b) Post-hearing shift of the burden of proof to Respondent.
> > Order: c) a 10-element DTT-type program commensurate with Petitioners desires, and with other related elements.
>
> Issue 3.0: Verbal contract/agreement on an IEP was broken; violation.

Order: Respondent charged with promissory estoppel.

Reimbursement I for the period 3-18-96 to the time that the IEP at 2.3 is fully implemented; granted.

Reimbursement II for expenses prior to 3-18-996; denied.

Petitioners appealed Issues 2.1, 2.2, and reimbursement issue II; Respondent appealed Issues 2.3, 3.0, and reimbursement issue I.

STANDARD OF REVIEW

1. MSER 25(2) requires as follows:

> The official who conducts the review shall do all of the following: (a) Examine the entire hearing record, which shall be provided to the state by the public agency in written verbatim form. (b) Ensure that the procedures at the hearing were consistent with the requirements of due process. (c) Seek additional evidence if necessary. . . . (d) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official. (e) Make an independent decision on completion of the review. The reviewing officer may affirm, reverse, or modify the decision of the hearing officer. [Remand is not an option within MSERs.]

2. The SHRO also considered the following principles:

a. The judgement of the SHRO should not substitute for that of the LHO, unless the LHO's decision is unsupported by the record. Unified school district No.512, 19 IDELR (SEA Kansas, 1992). In re: Jim B., EHLR 502:253 (SEA 1981); (South Montgomery School Corporation, EHLR 506:114 (SEA 1983)).

b. The SHRO should give deference to the findings of fact made by the LHO, "unless the non-testimonial, extrinsic evidence in the record will justify a contrary conclusion (South Montgomery School Corporation, EHLR 506:114 (SEA 1983) or unless the record read in its entirety could compel a contrary conclusion. Carlisle Area School District v Scott P., 23 IDELR (3rd Cir., 1995)". The record of this hearing, having been read and reviewed in its entirety, the SHRO concludes as follows with respect to the standard of review:

c. Deference can be denied to administrative findings of the HO particularly when, as here, they are not thorough and not careful. Union Sch. Dist. v Smith (15 F.3d 1519 (9th Cir. 1994)). The SHRO found that the decision was not supported by the record.

3. SHRO demurs from giving deference to the LHO's findings of fact: there is non-testimonial and extrinsic evidence in the record to justify a contrary conclusion

4. Further reasons for the SHRO's position are enumerated in the section entitled Procedural Matters.

A. BACKGROUND FACTS

I. BJ first exhibited developmental problems at about 2 and a half years of age. He was enrolled in a university pre-school program, but was soon terminated because his needs could not be accommodated there. Petitioners were then directed to their local school district.

2. Petitioners contacted school officials for assistance. In response, a home visit resulted, followed by an initial screening evaluation of BJ by Respondent on 10-29-93, for which Dr. Burilovich signed a form permitting BJ's evaluation and indicated that she had "received a copy of the rights and procedural safeguards available to me." (R-1.). BJ was then evaluated by a school psychologist and by a speech and language therapist. A multidisciplinary evaluation team (MET) report (R-l) was issued on 12-10-93, and an initial IEPC meeting was held 12-17-93 (T-1458, 1683). The IEPC (P-4) found Bradley eligible for PPI services (MSER 54), and to be provided twice a week, (increased to three times a week) in 1-hour sessions, with speech and language therapy consultation from 6 to 8 times a year.

3. Petitioners' pediatrician referred them to a neurologist (T-87), who further referred them (T-87) to the Developmental Disorders Clinic at the U of M Adult and Childrens Psychiatric Hospitals. There, at CA 3 years and 4-months, BJ was examined by Psychiatrist Luke Tsai, MD. Autism was diagnosed (3-25-94; P-3). Present during some part of the evaluation was Sue Boyer (T-94, 664), BJ's teacher, and, who Petitioners say was given a copy of the report (T-94). A search of all school files failed to produce a copy of the report. In January 1996 Petitioners' attorney faxed a copy to the director (T-832, R-15). Thus, no report

of the diagnosis was available until Petitioners provided a copy to Respondent. Ms. Boyer indicated that she placed everything she had received into BJ's file at Willow Run and had no specific recollection of having received the report (T-768). At some time between February 1994 and June 1994, BJ's daily program at the Willow Run infant/toddler program was increased to 3 hours a week (T-99).

4. At the end of the 1993-1994 school year, Petitioner mother wrote a letter to the Willow Run Superintendent addressing her concern at what she understood to be an impending program reduction that would affect teacher Sue Boyer (P-4). She also said that B.J. had "benefited immensely from the therapy and attention he has received from Sue Boyer." Furthermore, she noted that BJ was autistic, and she raised certain programmatic concerns, but made no specific requests nor did she request an IEPC meeting. The Willow Run special education director responded (c.6-14-94) and informed her that the PPI program was being reorganized, and that LCSD would soon be operating its own PPI. No other issues were raised.

5. The following synopsis summarizes the home and school activities provided to B J: In December 1993, Dr. Burilovich began a home program to provide DTT to BJ of about 1 hour a day until May 1994 (T-96-98, 100). From May to December 1994, DTT was gradually increased so that by December 1994, he was receiving at least 20 hours of DTT weekly. During the period from July 1995 through December 1995, the DTT averaged 25-30 hours a week. As of May 1996, B.J. was receiving 30 hours a week "at the table" for DTT, together with 10 hours a week of "incidental" learning

(T-216). During that same time, BJ's participation in school-based programming changed from 2 hours a week (December 1993 to Spring 1994) to 3 hours a week (Spring 1994 through June 1994) to 2.5 hours a day, 4 days a week (September 1994 to January 1995), to 2.5 hours a day 2 days a week (January 1995 through June 1995) to 2.5 hours a day, one day a week (September 1995 to November of 1995), and none as of c. 11-29-95. When the January 1995 reduction was effected, SLT Nichols continued to provide BJ with his full therapy schedule.

6. In May, 1994, they hired Sue Boyer, BJ's former PPI teacher while at Willow Run, to work privately with BJ at home, for c.6 hours a week. Petitioners did not know whether the Respondent was aware of the arrangement (T-670). The engagement ended Summer, 1994 (T-100-103; 111-112) because Ms. Boyer did not administer DTT as Petitioners had expected. Upon discontinuing Ms. Boyer, Petitioners engaged a volunteer, and then paid various Eastern Michigan University students to provide the DTT.

7. Before the Fall 1994, Petitioners decided not to send BJ to the PPI program at Willow Run. The PPI program was a consortium program operated by the Willow Run School District in cooperation with LCSD. When Petitioners were notified that BJ was to be transferred from the Willow Run program to the LCSD Pre-Primary Impaired (PPI) program, the district of residence, Petitioners permitted (R-5) BJ's evaluation (P-13). He began the LCSD PPI program in September 1994, 4 days a week, 2.5 hours a day. The DTT program was also continued privately at home.

8. On 10-01-94, Petitioners engaged Dr. Patricia Meinhold, a licensed psychologist in private practice (T-237), and an Assistant Professor in the Clinical Section of the Psychology Department at Western Michigan University, to observe BJ at home (c. 10-01-94). She concluded that BJ met the criteria as an appropriate candidate for DTT (T-316-318), although the criteria were not specified. She also suggested that Petitioners seek help from the District to implement a DTT (T-126-127). Although BJ was only 3 years and 10 months of age, she did not suggest that he required 40-hour DTT program.

9. On 10-5-94 an IEPC was held, at which Petitioners requested Respondent to implement a DTT program for BJ (T-127, 1462, 1615). The IEPC determined BJ eligible for PPI, and provided a program of 2.5 hours a day, 4 days a week, with direct speech/language therapy of 40-80 minutes a week, and specialized transportation (P-6). This IEP is now the stay-put IEP. Petitioners voiced no objection to the goals and objectives in the IEP (T-680-681). Independent of the IEP, BJ's PPI teacher, Betsy McMillan, volunteered to provide 30 minutes of DTT daily if he arrived before the school day began (T-127-128, 133, 695). This volunteered provision was terminated because Ms. McMillan was not conducting DTT in accordance with Petitioners' expectations (T-1493). Petitioners increased the DTT, and hired student tutors. By the end of November 1994, BJ received a minimum of 20 hours of DTT weekly at home (T-135).

10. In January, 1995, Petitioners informed the LCSD that they had unilaterally decided to reduce BJ's time in the PPI program from 4 days a week to 2 days a week (T-138-139). By the end of the 1994-95 school year, BJ was receiving 25-

30 hours of DTT (T-147). During the Summer 1995 Petitioners enrolled BJ in a day-care center, and had one of their trainers accompany him to try to facilitate his interaction with other children (T-148).

11. In September 1995, Petitioners notified LCSD that BJ would attend the school program for only one day a week. DTT was continued at home during that Fall. At the beginning of the 1995-96 school year, Petitioners' unilaterally reduced BJ's attendance to one 2.5-hour PPI session a week. That brief attendance was permitted by the parents solely to meet their desire for B.J. to have some socialization (T-147).

12. Petitioners' requested a delay in holding BJ"s IEPC meeting in the Fall 1995 (T-150). LCSD's new special education director, Ron Greiner, agreed to the delay (10-26-95; P-7). In that letter (P-7), the director, new to the role, rescheduled the IEPC to 12-01-95, and also arranged for a preliminary (get-acquainted) meeting with Petitioners and BJ's teacher for 11-10-95. The director unacquainted with Petitioners, wished to get to know them and their concerns prior to the IEPC meeting. Petitioners canceled the preliminary meeting (P-9; T-151, 819).

13. On 11-28-95, unannounced and without permission, Petitioner father entered his son's classroom to videotape BJ therein (P-50; T-157, 1480-1481). At the time the occupational therapist was conducting a group session with the children. While video-taping, Mr. Burilovich engaged in conversation with the teacher, Betsy McMillan, and with the speech and language therapist, Lin Nichols, who was also present. Ms. McMillan was not well, and left for the day,

upon the departure of the children. (T-1476). Petitioners also prepared an edited, 45-minute video-tape of the execution of the home DTT program. The 45' tape was edited from "10-20" actual hours of taped sessions. The video was shown at the I-EPC at the meeting of 12-01-95. It was also viewed by the independent evaluators, and Respondent's expert witness, Dr. Gary Mesibov.

14. When Respondent sought to video-tape BJ independently during the home DTT program, they were refused permission by Petitioners. Respondent then petitioned the LHO to rule on the matter. The LHO ordered briefs from the parties (9-9-96; T-34, 222). On 9-13-96 (at the 4th hearing session) he denied Respondent's motion, promised to provide his rationale for the denial at the next session, but did not do so, and remained silent about the issue thereafter.

During the IEPC meeting of 12-01-95, an adversarial one (T-1072), Petitioners demanded that Respondent develop an IEP structured around goals and objectives with a DTT approach in accordance with their specifications (P-11; T-152-154, 166-168, 168-173, 1072-1073, 1480). (The IEPC meeting was reconvened on 3-18-96, and yet again on 5-17-96.). The director was unaware of the report of BJ's diagnosis of autism (T-180, 832). LCSD finally received a copy of the report in January 1996 from Petitioners' counsel (T-832). After this meeting, from which no IEP issued, and after a series of telephone conferences were held between the special education director and Petitioners and or their attorney, the director proposed an outline of a program for BJ. (T-92-94, 180; P-3, P-12 (T-171, 731); HO-11, 12, HO-13).

15. Petitioners refused to discuss goals for BJ until their demands were met (T-1075, 1483). At that point, Petitioners believed that BJ's goals would need to come from someone trained in DTT such as Dr. Meinhold (T-169). Petitioners also presented Respondent with an ultimatum to the effect that BJ would be placed in a private program if the their demands were not met (P-12; T-1076-1077).

16. The directors's next contact with Petitioners was through their counsel, who requested an independent educational evaluation (IEE) (12-28-96; P-13; T-189). The request was ultimately approved and paid for by Respondent (P-14; T-327). Petitioners could have obtained an IEE by passing R, and seeking reimbursement for it after the fact.

17. On 1-23-96, independent evaluator Meinhold appeared at the LCSD seeking to observe the PPI classroom. As with the video taping event, neither advance notice for the visit, nor permission for the observation itself had been obtained by her (T-1099-1100). However, BJ had not attended the program since November 1995.

18. In late January 1996, the director gained Petitioners' permission, which he had sought since December 7, to speak with Dr. Meinthold (P-12 p47; T-1109).

19. On 1-3-96, staff evaluated BJ for autism (P-16; T-1786). The evaluation included a home observation on (l-31-96) by a 3-member team, including the director, a SSW, and a school psychologist (T-1789; P-18). A MET report followed (2-09-96) affirming that BJ met the criteria for a determination of autism (P-18, R-18: T-1669, 1795). At the

time, B.J. exhibited some eye contact, a short attention span, and uttered no words to observers. He approximated words only when directly and specifically prompted by his mother (T-1792, 1834). BJ's scores on the Vineland Adaptive Behavior Scales showed almost no change in age equivalence from December 1993 to January 1996 (compare P-18, p59 and P-1, p4).

20. On 2-02-96 Petitioners requested that Dr. Meinhold complete her IEE (P-23). Prior to 2-12-96, she had had conversations with the director in which she conveyed basic components of her recommendations, and a proposal for DTT training for the staff involved with BJ. (P-19;T-1597, 2022; P-21; T-328-335). On 2-12-96, Dr. Meinhold faxed to Respondent a draft of recommended IEP goals, based upon her evaluation and observations (P-17).

21. On 3-06-96, Respondent sent to Petitioners' attorney, an outlined proposal for a program for B J, including a statement of the commitment that Respondent was willing to make therefor (P-19). He also informed the attorney that Dr. Meinhold had not yet issued a report, in a letter to Dr. Meinhold (3-11-96), the director expressed certain and various concerns, particularly that her representations to him had changed (P-21; T-1118).

22. On the morning of 3-18-96, the IEPC meeting being scheduled for that afternoon, Dr. Meinhold faxed to Respondent her evaluation report (P-23). Her report was based on a 3.5-hour visit to Petitioners' home on 2-02-96, and upon a review of (unidentified) records (P-23 p71; 1527, 1693). The report reveals no indication that it was based on

any formal assessments (T-1695) especially for cognitive functioning (T-1734). She recommended "the 'Lovaas' style package of discrete trial based programs"; i.e., 1:1 DTT 40 hours a week, to be divided between home and school (P-23, p72).

23. In the forenoon of 3-18-96, the IEPC meeting convened (the 2nd, the first was held 12-01-95). Counsel for both parties were present, as were Petitioners, and Dr. Meinhold. During the meeting, Dr. Meinhold discussed at length her recommendations, and then answered the staff's queries. Full consideration was given to the IEE report, as it was also after 4-16-96 and specifically on 4-26-96.

24. Subsequently, Respondent's personnel caucused. When the meeting resumed, the director presented Respondent's proposed program, which accorded with Petitioners' demands. Mr. Greiner presented the outline of a program for BJ which included a DTT component; the proposal was made to please the parents and avoid a due process hearing, and was made without staff support (T-1063). The proposal was accepted by Petitioners. The 8-component program (T-1343-1380) that the director offered, in the presence all assembled, were as follows:

a. 35 hours of educational instruction, 30 hours of which would be provided in a DTT format, the balance in general education.

b. The program would be implemented by two (1 FTE) paraprofessionals and one back-up paraprofessional, all of whom would be trained for DTT.

c. The paraprofessionals would work with BJ for his DTT and for his general education exposure.

d. Weekly team meetings would be held, to which the parents would be invited to participate.

e. Respondent would accept the goals and objectives developed by Dr. Meinhold.

f. Dr. Meinhold would train staff, monitor the program, and provide oversight for the program.

g. An extended school year of 8 to 10 weeks, with 6 hours a day of DTT and contact with nonhandicapped peers.

h. A transition plan (to occur over an 8 to 10 week period) from a home based DTT program to a school based DTT program.

25. When Respondent moved to formalize the IEP, and reduce the agreement to writing on the official IEP form (T-1133, 1136) Petitioners raised the issue of reimbursement for expenses incurred for the home DTT program (T-1126-1127). Petitioners' position was that the reimbursement issue was a part of the IEPC process, and they wanted to reach agreement on all issues, including reimbursement, prior to finalization of an IEP. The reimbursement issue was not resolved, no written IEP accrued, and the meeting adjourned. As to the reimbursement issue, Petitioners had not presented their expense account for consideration by Respondent. This IEPC meeting was of 3.5 to 4 hours in duration (T-1021).

26. Staff had not supported the director's proposal at the IEPC meeting. The concerns of the staff were expressed to him, and thus, he scheduled a meeting with them for 4-16-96

with Washtenaw ISD TC Marianne Miller, as presenter, for staff to gain insight into DTT methodology and "Lovaas-style" DTT (T-1281). At the meeting of 4-16-96, Ms. Miller presented materials concerning DTT and "Lovaas." She noted that she found DTT useful with certain isolated behaviors, but had concerns about using DTT as an exclusive methodology (T-1602; 1901-1907).

27. An exchange of letters and telephone conferences took place between the parties beginning 4-16-96, P-18) as to why the IEP had not been presented. Violations of MSER 21c were cited, and the possibte civil action to attain closure was threatened (T-45) (The record does not show that Petitioners invoked the Michigan special education complaint procedures provided in MSER Part 8 toward this end.).

28. On 4-26-96, staff began drafting a plan with goals and objectives, and which they believed addressed BJ's unique needs, based on Dr. Meinhold's assessment of BJ's current functioning level (T-1289, 1526; 1704-1705). Ms. Miller facilitated the meeting. The draft goals and objectives and draft daily schedule program, produced by the staff, were based on their knowledge of BJ, and their prior experience with autistic students (T-1526, 1529, 1539, 1706). Petitioners alleged that the team meetings were IEPC meetings that were held without the presence of Petitioners, however, HO-14 (T-1736), HO-16 (T-1511, 1804, 1950), HO-17 (T-1806), and HO-18 (T-1705) reveal them only to be staff meetings to consider their clinical findings for a proposal to present at an IEPC meeting.

29. The director forwarded to Petitioners' attorney (5-6-96) a copy of the staff's proposal for goals and objectives, and a daily schedule for potential implementation at the Early Elementary School. He also indicated that if, prior to the IEPC meeting scheduled for 5-17-96, questions arose concerning the new proposals, that he be contacted (P-26, p 80). In that correspondence, he also denied Petitioners request for reimbursement. The director was not contacted by Petitioners prior to 5-17-96 with any input or questions concerning the staff's revised proposal.

30. The IEPC reconvened for the third and last time on 5-17-96 (HO-19; P-26). Thereat Petitioners expressed concerns about the appropriateness of the proposed program and why it differed from that of 3-18-96 to which they had accepted (T-1314, 1316, 1545). At that meeting, the director attempted to review and provide the rationale for the proposal (T-1716). An IEP was written which included the Respondent's goals and objectives and a daily schedule, as well as the other aspects referenced in Greiner's letter of 5-6-96, which itself is comprised in the IEP (P-28). Reimbursement was not raised at the 5-17-96 IEPC meeting.

31. On 5-23-96, Petitioners signed the official IEP form to indicate their disagreement with the IEP and at once, requested a due process hearing (T-216).

Note: A chronological list of events is presented at Appendix B.

32. The challenged IEP of 5-17-6 (excerpted) (Exhibits P-28, P-29 and R-28, R-29):

a. The IEPC meetings of 12-01-96 and 3-18-96 were reconvened on 5-17-96. The IEP is based on the MET report of 2-9-96.

b. The purpose of the IEPC was threefold: 1) annual review; 2) redetermination of eligibility; and, 3) redetermination developing eligible program".

c. Petitioners were contacted on 3-1-96 by phone, and on 3-11-96 by letter.

d. Participants in attendance: Mother; Dr. L. Burilovich, 3-18-96 & 5-17-96; Petitioners' attorney: R. Landau 3-18-96 & 5-17-96; Respondent's attorney: M. Eschelhach 3-18-96 & 5-17-96; Special education director; R. Griener 3-18-96 & 5-17-96; School social worker; S. Senunas 3-18-96 & 5-17-96; PPI Teacher; B McMillan 3-18-96 & 5-17-96; Speech and language teacher; L. Nichols 3-11-96 & 5-17-96; Paraprofessional: A. Allen 3-18-96 & 5-17-96; S. McNally 3-18-96 & 5-17-96; School psych: A. Stamps 3-18-96 & 5-17-96; Petitioners' consulting psychologist: P. Meinhold 3-18-96, School principal: M. Goodsman 3-18-96; School psychologist: M. Lupini 3-18-96.

e. IEPC determination: Eligible as autistic impaired. R 340.1715.

f. [The IEP comprises a letter (3 pp. dtd 5-6-97) from Director Griener to Petitioners in response to the latter's inquiry regarding follow-up of the recessed IEPC meeting of 3-18-97. The letter includes two attachments:] 1) "Proposed annual goals and short term instructional objectives, based on

discussions at the 3-18-96 IEPC meeting; and 2) A schedule that reflects placement in a full day kindergarten, and a schedule of how the goals and objectives will be implemented, . . . [and] how and when they will be evaluated." A third, unpaginated attachment, consisted of a statement of rights and safeguards. The letter lists the following 10 programmatic specifications:

g. "Length of the school day is about 8:45 - 3:30, or 6 3/4 hours a day.
"[BJ] will have the same general education kindergarten teacher for AM and PM sessions.
"He will receive support from trained 1:1 paraprofessionals during the school day
"He could be transitioned into the program, beginning with part of all of the AM session, or PM session, for example, and moving to a full day program later, if Parents prefer a gradual phase in.
"ESY is not specifically addressed herein because staff will need to work with BJ to identify his needs for ESY. There are 6 options available for ESY, should BJ prove eligible for ESY. The specific option determined to be best or BJ would be identified through discussions between the [Parties] in June, with follow-up in an IECP metting.
"[Respondent] proposes having weekly team meetings with the Parents and selected staff. After 8 weeks, the team meetings would occur at 2 week intervals, and could be extended to monthly and when the team feels comfortable with that.
"The requests for reimbursement are denied.
"[Respondent's] proposal needs to be discussed and voted on at an IEPC meeting,

"[Respondent] proposes to reconvene the IEPC on 5-17 at 9 AM. . . .
"Invited participants would include [Petitioners], most of the District staff in attendance on 3-18, plus several staff from WISD. [Counsel for the parents would certainly be welcome to attend."

h. [One of the attachments consisted of 5 statements of goals and objectives, including present levels of performance, annual goals, and detailed short term instructional objectives. The statements of the present level of educational performance were adopted by Respondent because Dr. Meinhold, Petitioners' indpendent evaluator was the last to assess BJ.] The goal statements, each with detailed short term instructional objectives with related assessment procedure, performance criteria, and schedules for evaluation, follow:

"GOAL 1 - Imitation: Present level of performance: At home, BJ imitates placement/positioning of 2-3 objects. "Annual goal: BJ will imitate placement/positioning of himself and objects during naturally occurring classroom activities, with deceasing prompts and cues. [Three detailed short term instructional objectives obtain for this goal.]

"GOAL 2 - Receptive language: Present level of performance: BJ inconsistently points to objects when identified by an adult. "Annual goal: BJ will demonstrate understanding of the names of 20 objects found in the school and home environment, presented in an array of up to five. [Three detailed short term instructional objectives obtain for this goal.]

"GOAL 3 - Expressive language: Present level of performance: BJ's use of yes / no and labels for objects is inconsistent. "Annual goal. BJ will use words to express his wants and needs. [Six detailed short term instructional objectives obtain for this goal.]

"GOAL 4 - Self care skills: Present level of performance: BJ does not dress independently; does not toilet independently. "Annual goal: BJ will improve his ability to dress and toilet independently in school with decreasing prompts and cues. [Three detailed short term instructional objectives obtain for this goal.]

"GOAL 5 - Building prosocial skills: Present level of performance: BJ currently engages in non-social vocalizations, isolated play, and sensory seeking behaviors. "Annual goal: BJ will engage in parallel play, turn taking and socially appropriate sensory behaviors. [Three detailed short term instructional objectives obtain for this goal.]

i. [Pages 10-12 of the proposed IEP comprise a detailed, full-day, daily schedule.] The morning session begins at 8:40 AM and end at 11:30 AM. The afternoon session begins at 12:25 PM and ends at 3:25 PM.

J. School building: BJ would attend school with students who are not impaired, also being the one he would attend if he was not impaired.

k. Supplemental aids and services necessary to enable him to participate in general education programs: a) detailed in daily

schedule; 2) 1:1 paraprofessional to meet curricular and behavioral needs.

l. The LRE options (including supplemental aids and services) that were considered, and reasons they were rejected: PPI wouldn't meet needs, given the amount of time - never given a fair chance.

m. Activities in which BJ will be participating with students who are not impaired as determined appropriate in academic, nonacademic, and extracurricular services and activities [detailed] per daily schedule.

n. He can be gradually introduced into the district program as the parents identify in the team meetings, subject to team meeting.

o. Ancillary and other related services:
1) Psych .1701;
2) team meetings,
3) SSW .1701c meetings;
4) S/L .1071c: daily contact minimum 25 minutes a day, w/emphasis on skill acquisition w/parapro;
5) TC/WISD .1749: consultation, minimum 4 x 15 minutes;
6) TC .1749: consultation;
7) OT .1701c: direct 1x / week, 15 minutes;
8) OT .1701C: consultation 1x / week 15 minutes minimum.

p. Proposed initiation date: 5-19-96 — Proposed duration: 6-19-96 — Actual implementation dates: 5-20-96 [to] 6-19-96. [33 days]

q. Physical education: per daily schedule.

r. Hours in special education: 0 Hours in general education: 6.5

s. Location of program and services: Early Elementary School, LCSD.

t. Daily schedule (compared with Petitioners' home program schedule):

Daily Home Schedule

9:30 - 9:45	Therapist arrives; get dressed
9:45 - 10:45	"Lovaas-style" DTT
10:45 - 10:50	Bathroom
10:50 - 11:15	"Lovaas-style" DTT
11:25 - 12:00	"Lovaas-style" DTT
12:00 - 12:30	Outside Play
12:30 - 1:30	Lunch; Bathroom
1:30 - 3:00	"Lovaas-syle" DTT
	Play break

Daily School Schedule

8:40 - 9:50	Arrive at school; Free Choice
9:50 - 10:10	Opening: Specials
10:10 - 10:30	Large Group Instruction
10:30 - 11:30	Seat Work I
11:15 - 11:25	Play Break
11:30 - 12:25	Free Play; Recess; Lunch

12:25 -	1:30	Arrival; Free Choice
1:30 -	1:50	Opening; Specials
1:50 -	3:25	Large Group Instruction
2:10 -	3:25	Seat Work
	3:25	Leave

33. Issues heard by the LHO (Decision, p 13):

a. The hearing issues focus on a) whether the disputed IEPC of 5-17-96 provided a FAPE for BJ, b) adherence to procedural safeguards, c) and parental request for reimbursement. (p 13). The following matters are not at issue: 1) that BJ's special education category is autism (MSER 15); 2) his eligibility for special education and related services; and 3) autism and autistic children in general.

b. Respondent contends that the contested IEPC developed for BJ meets his unique needs, and that procedural safeguards were adhered to in the development of his program(s) (p 18. Sec. B II). Specifically: The 5-17-96 IEP addresses BJ's unique needs and provides a FAPE for him. 2. Procedural safeguards were adhered to in the development of BJ's program. 3. The burden of proof remains with Petitioners, who challenged the IEP. 4. No reimbursement to the parents is required or justified.

c. Petitioners contend that, 1) the contested IEPC developed for BJ does not meet his unique needs, 2) that procedural safeguards were violated, 3) requiring that the burden of proof be shifted to Respondent, and 4) that reimbursement to the parents is warranted for costs incurred with providing BJ a

program at home. (p 13. Sec. B.I). The specific issues (Decision, pp 13-14) put forth by Petitioners' are:

1. Does the IEP here on appeal constitute a FAPE for BJ in terms of providing him with "special education", meeting his "unique needs", and the other requirements of the IDEA and MMSEA? 2) Was there any justification under the IDEA, MMSEA or their respective regulations for respondent to unilaterally withdraw it's proposal of special education programming and related services as made at the 3-18-96 IEPC? 3) If the IEP here on appeal is found not to provide the student with a FAPE, what array of programs and services are necessary to provide him with a FAPE as required under IDEA, MMSEA and their respective regulations? 4) If the IEP . . . is found not to provide the student with a FAPE, to what extent is respondent obligated to reimburse the parents for the cost they incurred in providing the student with a program at home? 5) Were the evaluations conducted by respondent prior to the development of the IEP here on appeal appropriate" within the meaning of the IDEA, MMSEA and their respective regulations? 6) Did respondent comply with the procedural requirements of the IDEA, MMSEA? 7) If respondent failed to comply with the procedural requirements of the IDEA, MMSEA. . . . , should respondent bear the burden of proving that its IEP provides a FAPE?

B. THE HEARING

34. Dr. Henry Gottwald was appointed as the LHO by the MDE on 6-27-96 because attempts at selecting a LHO mutually agreeable to the parties had failed. A pre-hearing telephone conference was held on 7-15-96. The hearing was

held closed to the public in 9 sessions, at the Washtenaw ISD. It began on 9-9-96, continued on 9-1, 9-12, 9-13, 9-16, 9-17, 9-18, 9-25, and concluded on 10-01-96. Petitioners were represented by Mr. Richard Landau, of Dykema Gossett, and Respondent by Mr. Michael Eschelbach, of Thrun, Maatsch and Nordberg.

35. Pursuant to MSER 24b (c), Petitioners submitted 5l proposed exhibits, and a list of 23 proposed witnesses. Respondent submitted 33 proposed exhibits, and a list of 15 proposed witnesses. The parties submitted three sets of briefs: 1) Briefs on motion of Respondent to observe and videotape BJ at DTT at his home (These briefs were, and are, missing from the hearing record received by the SHRO.), 2) Post-hearing briefs, and 3) Briefs on appeal.

36. Petitioners, assigned the burden of proof for having challenged the IEP, went first, beginning their case with allegations of procedural violations (T-55).

37. WITNESSES

Note: The LHO noted that "many of the witnesses . . . were mutual, and not all of them were . . . called upon." (Decision, pp 14 and 18). The witnesses were sequestered.

a. Petitioners' witnesses: Petitioners called 4 witnesses.

1. LINDA BURILOVICH, Ph.D.: Petitioner mother, is a Professor of Business Administration, at Eastern Michigan University. Dr. Burilovich was not designated as an expert witness. The testimony intermittantly taken from her spans

316 pages, in which she expresses observations of her child's status, personal opinions of a non-professional nature regarding Lovaas DTT methodology and of programmatic considerations of Respondent's program.

2. PATRICIA M. MEINHOLD, Ph.D.: Dr. Meinhold, a licensed psychologist, is an Assistant Professor with the clinical faculty in psychology, at Western Michigan University. (Her curriculum vita, P-47, is updated to c.February 1995). Dr. Meinhold presented the apologia for the Lovaas methodology: Dr. Ivar Lovaas, the developer of DTT methodology, was not a witness. The validity of her testimony, regarding the theoretical and research aspects of Lovaas methodology, exclusive of clinical application to BJ's concerns, is equivalent to that of Dr. Gary Mesibov, expert witness for Respondent.

3. PETER A. HOLMES, Ph.D.: Dr. Holmes is Professor of Psychology at Eastern Michigan University, and a licensed psychologist. His resume (P-48), updated to c.October 1994, "fairly accurately summarizes [his] professional experiences." (T-468).

3a. In regard to autism, Dr. Holmes testified as follows: "I have trouble defining autism because it's an evolving concept" (T-515), it is a "very muddy category, there are a lot of reasons people get labeled autistic" (T-461). As to definitions of autism, he testified that they come from "books . . . Catherine Maurice" (T-516), but he did not cite the Diagnostic and Statistical Manual (DSM-IV) of the American Psychiatric Association, the sine qua non used by

psychologists as well as psychiatrists for diagnoses, including autism.

3b. With respect to BJ, Dr. Holmes testified that he had observed BJ in his home last July or mid-August (T-484, 503) for about one hour (T-572). His observation included the review of two video tapes (P-49 and P-50). He described exhibit P-49 as a Sequence of short training episodes that began in 1994 and continued "almost to the present" with a variety of trainers (T-494). He also read reports and IEPs (T-495), but he conducted no assessments. Although he looked at the data, he had not framed an opinion about what should be done next (T-574). He has no idea as to how BJ compares with the selection criteria used to select the subjects for the 1987 Lovaas study (T-553). He testified that he had read the Lovaas 1987 study, filed it, and referred to it in classes, "but that was it" (T-547).

3c. Although he had not used DTT with young autistic children (T-548), he opined that Respondent's goals for BJ are "fine" but that they are much "lower goals" and much less precise than those of Dr. Meinhold (T-504). He had never been involved in the development of an entire educational program that would be recorded in an IEP (T-535). Nevertheless, he recommended 40 hours a week as described by Lovaas, because that is "what Lovaas recommended" (T-548), and because "that's what the system can bear." He went on to say that he thought it [40 hours] "has to do with the 40-hour week" -- "where that figure comes from" (T-549).

3d. According to Dr. Holmes (concurred with by the LHO, T-720), "Trainers . . . burn out with more than 10 hours per week of DTT. Their tolerance is 10 hours" (T-579, 720). Paradoxically, Ms. Dorenkamp (Respondent witness) observed that in her opinion, Dr. Meinhold's program is too intense for a child of that age (T-2005). In the instant case, only Petitioners' and their consultants, Drs Meinhold and Holmes, support 40-hour DTT programming for BJ. Forty hours is equivalent to 8 hours a day. Dr. Holmes further opined that the point at which conducting DTT is no longer useful, is "when the person is indistinguishable from everybody else" (T-554).

4. Without expressing an opinion on their respective positions towards Lovaas DTT methodology, the SHRO discounts the testimony of both doctors (Meinhold and Holmes), finding them motivated more by a professional and/or a personal agenda rather than having been derived from fact specific inquiries into what constitutes an IEP for BJ. Neither the curriculum vita, of Dr. Meinhold nor of Dr. Holmes, disclosed any evidence of having had training in Lovaas DTT methodology, and neither discloses any evidence of collegiate (either undergraduate or graduate) instructional or research activities regarding Lovaas DTT (P-47, P-48 respectively). Also, neither doctor shows any documented evidence of training or experience with kindergarten pedagogy, nor of programming for a child with disabilities within a kindergarten setting.

5. RON GREINER: Greiner was called by both parties. He assumed the position of LCSD director of special education on 7-1-95. He was previously a supervisor of special education

with LCSD (January 1995 to June 1995). Before that he was a supervisor of special education at Washtenaw ISD. He has since returned to Washtenaw ISD (July 1996), to serve as a supervisor of special education (T-775-778). The testimony of Mr. Greiner is credible both in Respondent's favor and in Petitioners' favor. He did not deny that he had presented the elements of program at the IEPC meeting of 3-18-96, that were agreeable to Petitioners though unrealized as a part of a formal IEP.

b. Respondent's witnesses: Respondent called 7 witnesses.

1. The LHO observed that "The testimony by district personnel (Nichols, Senunas, Miller, Dorencamp, Stamps) tended to discredit DTT in favor of a more "eclectic" approach (Decision, p 33). Contrary to the LHO, the staff is did not tend to discredit the use of DTT as an instructional technique. In good faith, they gave objective professional critiques of DTT, they viewed BJ's needs from their own perspectives, and they expressed alternatives for the methodology effective for BJ. They expressed professional differences regarding Lovaas DTT methodology. They based their opinions on their respective clinical experiences as well as knowledge of BJ and his unique needs. Consequently they propounded a methodology that differed completely from that sought by Petitioners.

2. SHERRY SENUNAS, LCSD school social worker. Ms. Senunas does not consider DTT to be aversive, but she does consider it to be stressful at the rate of 6 hours a day (T-1841). Ms. Senunas observed B.J. in January 1996 as part of the MET team. She viewed Petitioners' edited home video

(P-49). She opined that the goals and objectives contained in the District's May 17 IEP were ambitious, but appropriate (T-1810).

3. LIN NICHOLS, LCSD speech and language therapist, was a participant in BJ's initial MET evaluation in 1993 (P-1; T-1455). She provided service to BJ in the classroom 3 sessions a week for 15' each. (T-1470-1471). She had attended several workshops on DTT (T-1449). Based on her interactions with BJ, as well as viewing Petitioners' edited video (P-49), Ms. Nichols saw only minimal progress in BJ's verbal imitative skills as well as an increased level of compliance (T-1491-1492). Ms. Nichols has achieved success with autistic students using the type of program contained in the 5-17-96 IEP. She believed that the IEP would be successful with BJ as it set forth how appropriate goals (based on Dr. Meinhold's assessment of current functioning level) were to be addressed in a naturalistic environment, and would allow staff to use different methodologies to determine which work best with B.J. (T-1567-68, 1571, 1573). Ms. Nichols opined that the daily schedule technique is effective with BJ, because it addressed all of his goals, which Dr. Meinhold had recommended, in that those goals would be implemented in a naturalistic environment, and that desired behaviors would be developed in a natural setting (T-1567). She believed also that too many goals had been required. Ms. Nichols was amenable to the recommendations in Dr. Meinhold's report as an act of good faith, because Petitioners believed the report (T-1585), because she had seen BJ most recently, and as an act of cooperation with Petitioners (T-1527). As to DTT, she said "if we have to do it [DTT] - we do it" (T-1525).

4. The LHO was argumentative with Mrs. Nichols (T-1513). He also permitted her examination to reach a point at which she petitioned him (the LHO) for a break: . . . "please, I feel like I'm being harassed." The LHO said only, "all right" and permitted a respite. (T-1639).

5. AMY STAMPS, LCSD school psychologist. Ms. Stamps attended the IEPC meetings of 3-18-96 and 5-17-96, but not the one on 12-01-96 because Petitioners did not want her there (T-1682, 1687). Ms. Stamps has experience and training with respect to autism (T-1679). She has worked with c.15 autistically impaired students in the last 5 years (T-1680). She was a participant in BJ's initial evaluation and first MET activity (P-1; T-1681). She has studied behavior modification in two courses, and she has designed 10 behavioral modification programs (T-1725). Ms. Stamps believed that Dr. Meinhold's goals and objectives are valid because she [Meinhold] was the last to see BJ (T-1705), nor does harbor hostility toward those proposals (T-1760). However, she opined that the proposed program in the IEP of 5-17-96 is best for BJ (T-1731, 1753). Ms. Stamps testified that, based upon her experience, Respondent's proposal is more appropriate for BJ than is Dr. Meinhold's (T-1749. 1753). While Ms. Stamps was concerned with the full-day aspect of the proposed program, she was satisfied that the daily schedule provided the potential for adaptations and time out of the regular education classroom (T-1707).

6. At two points in her examination, the LHO misunderstood Ms. Stamps (T-1761, 1763, 1774) and unwarrantedly chastised her: "I want an honest answer -- you're dancing around the questions, to be very honest" (T-1761). Again

later, he accused that, "you've got as closed mind" (T-1763). Although the transcript reveals that the LHO did misunderstand Ms. Stamps, he took umbrage with Respondent's attorney on requesting permission to explain the LHO's misunderstanding.

7. MARY ANN MILLER is a teacher consultant with the Washtenaw ISD. She holds state approvals for the education of the autistically impaired, the emotionally impaired, and the mentally impaired (T-1923). Ms. Miller had previously utilized intensive DTT with autistic students very similar to the type of DTT which BJ had been receiving at home (T-1923). As a result of her years of experience in working with many autistic children, Ms. Miller had determined that methodologies other than DTT were more effective (T- 1903, 1904-1907). As to training in Lovaas DTT, she, like Dr. Meinhold and Dr. Holmes, is an autodidact, (P-47, P-48).

8. DEBRA DORENKAMP is a teacher consultant with the Washtenaw ISD. She holds approvals for the education of the autistically impaired, the emotionally impaired, and the preprimary impaired (T-1985). She has used DTT universally throughout her employment history (T-1995). At Washtenaw ISD she has worked with c.30 children with autism (T-1998). Her experience includes teacher training for the autistically impaired in association with Michigan State University while a teacher consultant at Ingham ISD (T-2001). She opined that Dr. Meinhold's 40-hour programming would be too intense for BJ, and that it doesn't incorporate instructional methods BJ needs to function as appropriately as possible (T-2005). Ms. Dorenkamp indicated that she had also employed intensive DTT with autistic students at Ingham ISD (T-1987,

1989, 1994). While at Ingham ISD, she had seen that DTT did not produce generalization, and so began using other techniques (T-1996). She had also worked with a number of autistic students who had achieved success with the type of daily schedule program proposed for B.J. (T-2006).

9. RON GREINER: Mr. Greiner was called by both parties. He assumed the position of LCSD director of special education on 7-1-95. He was previously a supervisor of special education with LCSD (January 1995 to June 1995). Before that he was a supervisor of special education at Washtenaw ISD. He has since returned to Washtenaw ISD, to serve as a supervisor of special education, July, 1996, (T-775-778).

1O. GARY MESIBOV: Dr. Mesibov, clinical psychologist, is Professor (University of North Carolina at Chapel Hill) and Director of the North Carolina TEACHH State-wide Program for People with Autism. Although, Dr. Mesibov reviewed BJ's records including the challenged IEP, the IEE report, and Petitioners' video-tapes. Dr. Mesibov's testimony, bears weight.

11. As Dr. Ivar Lovaas, himself was not a witness, Dr. Meinhold served as his apologist. In doing so, Dr. Meinhold's professional and theoretical opinions regarding Lovaas research and methodology, aside from her clinical interests, are open to critique. Thus, the opinions of Professor Mesibov bear weight for the consideration of the foundation of programming for BJ's unique needs, if not the clinical ones. Dr. Holmes testimony was entirely without merit in the theoretical level considerations. Dr. Meinhold

acknowledged that professional discussion ensues regarding how to interpret the application of Lovaas' research (T-256).

11a. In the Lovaas study published in 1987, Dr. Lovaas noted that "higher scores on I.Q. tests, communicative speech and appropriate play are considered to be prognostic of better outcome." (P-32 p140). Lovaas' subjects were enrolled for treatment if they: 1) had an independent diagnosis of autism; 2) had a chronological age of less than 40 months if mute and less than 46 months if echolalaic; and 3) had a prorated mental age of 11 months or more at a chronological age of 30 months. Dr. Lovaas acknowledged in his study that it was unlikely that the treatment affects obtained could be replicated without the component of contingent aversives (P-32, p145). Physical aversives such as were employed in the Lovaas study are not a part of the program recommended by Dr. Meinhold. Dr. Mesibov testified that Lovaas himself indicates that if children start in the "Lovaas" program and do not show rapid growth in verbal imitation after 3 to 4 months, they are probably less appropriate for the "Lovaas approach." (T-956). Dr. Mesibov indicated that the use of intensive DTT makes generalization and socialization very difficult (T-954). Dr. Mesibov found that while the IEP (P-29) reasonably left certain aspects to be worked out in the context of BJ's work at school, the IEP contained the components of an appropriate program (T-913-920).

38. EXHIBITS

1. The LHO noted that "Throughout the hearing / transcript, a disproportionate amount of reference is directed towards the Petitioners exhibits. These exhibits were numbered and

subsequently page numbered consecutively. Since many / most of the Respondent's exhibits were identical, in most situations it was expedient to refer to the former exhibits, and both parties did so" (Decision. p 22; T-1160). The LHO also noted that "many of the exhibits . . . were mutual, and not all of them were referred to. . . ." (Decision, pp 14 and 18). Thus, there are 25 "mutual" exhibits, 13 Petitioners' exhibits (of 51 submitted), and 7 exhibits (of 33 submitted) from Respondent. The LHO submitted 21 exhibits (HO-la through HO-20), and the SHRO submits 15 exhibits (SHRO-1 through SHRO-15). The lists of exhibits are presented in Attachment A.

2. Exhibit P-50. Petitioners' video-tape. On 11-28-95, Petitioner father, unannounced and without formal permission, entered the classroom of Betsy McMillan, in whose classroom his son was a student (T-159). Although Ms. McMillan, apparently permitted his entry (T-726), she had no authority to do so (the LHO ruled that a teacher is not an agency official (T-827)), and also breached the confidentiality of the other handicapped children in the room. The class was in an occupational therapy session at the time that BJ's father entered (T-1476). Furthermore, Ms. McMillan was ill that day and left for the day after the children had departed (T-1476). Dr. Holmes having viewed the tape, testified that B J, being very distractible, indicated his distractibility by having made eye contact with the camera (T-533). Dr. Holmes further testified (T-509) that it was even more distracting when Petitioner father began a conversation with the teacher as he continued taping. Dr. Holmes also observed that the father's presence was a distraction (T-532). Speech and language therapist Lin Nichols was also in the

classroom during the taping (T-1474), and she corroborated that the episode was distracting to BJ (T-1477). The director has since requested the surrender of the tape at the12-1 IEPC (T-1911).

3. Exhibit P-49. Petitioners' video tape. An edited video-tape (P-49), includes some clips of BJ taken after the disputed IEPC of 5-17-96 had occurred. The 45-minute edited tape reflects the broad span of "10-20" hours of taped observations (T-613). Furthermore, Petitioner mother testified that in recording trials, the total number of trials are not recorded, only the number of expected responses made are recorded so that a percentage can not be obtained, i.e., one is unable to tell how many times an incorrect response was made (T-617), or whether any discrete trials were totally unsuccessful.

3a. The tape was viewed at the IEPC of 12-01-96. It was individually observed by Ms. Stamps (T-1716), by Ms. Nichols (T-596-610, 1481, 1511), by Ms. Dorenkamp (T-1997-1998), Dr. Holmes, and Dr. Mesibov. Ms Nichols concluded, from viewing the tape that within the 2-year span of varying degrees of DTT administration, BJ's initiation skills, particularly in the area of verbal, that she expected to have seen more growth.

4. The video-tapes produced by Petitioners (P-49 and P-50 respectively) hold no weight. The former, because of the manner in which it was obtained, and the latter (P-49), because of the editorial modification without specification of the criteria used to edit the tape, because of its concentration of 40-50 hours of real time into 45 minutes, and because it includes observations taken after the IEPC of 5- 17-96.

5. Exhibit P-5l. Audio-tapes of a certain part of the IEPC session of 3-18-96. The audio-tapes (P-5l) hold no weight. The LHO required the replay of the entire tape during the hearing (T-1343), although he had previously said that he "had a hard time picking up some of the proposals" in them (T-204). The audio tapes consist of 2 cassettes recorded on 3 sides, on which a recording was made of a certain portion of the IEPC meeting proceedings of 3-18-96. The quality of the recording is extremely poor, tonal distortions abound, gaps of several seconds exist, and episodes of several persons speaking simultaneously occur. No transcription is available, no list of the speakers, who, for the most part are indistinguishable and indeterminate, except in the case of male and female voices).

C. APPEALS

39. The SHRO was appointed, 1-14-97, to review the appeals of Responent (11-25-96) and Petitioners (11-28-96 and 12-13-96) (SHRO exhibits 1 and 5). The record of the hearing was received, incomplete, on 1-22-97. The Department sent a notice of the appeal to the parties (12-3-96). Respondent requested an opportunity to submit a brief on appeal. The SHRO agreed to the request and set forth the criteria for submission of the briefs, and the parties responded.

40. Appeal of respondent-appellant

> a. The LHO erroneously found (Decision. p7) that alter Petitioners' request to delay the annual IEPC review meeting, the IEPC

meeting was first rescheduled for 11-10-95. The meeting set up by Mr. Greiner was to be a "get acquainted" meeting only, and was not to be an IEPC meeting (see P-7).

b. The LHO erred in finding, as a matter of fact, that at the IEPC meeting on 12-1-95, Petitioners submitted a list of requests and that the parties were unable to agree at that time because of insufficient goals and objectives. The list presented by Petitioners at the IEPC meeting was a list of demands not "requests (P-11; T-1480). At that time Petitioners refused to discuss goals for BJ until their demands were met (T-1075, 1483). Furthermore, Petitioners would not accept goals produced by the District, rather requiring that goals come from an individual trained in DTT (T-169).

c. The LHO erred in finding thnt the 3-6-96 letter from Ronald Greiner to Petitioners' attorney outlined a FAPE. The tentative proposal outlined by Mr. Greiner in his letter of 3-6-96 and at the IEPC meeting on 3-18-96 IEPC meeting did not include all of the information required to be in a complete IEP. Those proposals did not include objective criteria and evaluation procedures and scheduling for determining whether DTT instructional objectives were being achieved, the extent of participation in regular education,

the identification of the LRE, the specification of related services. Indeed, when the District offered on 3-18-96 to proceed with writing up a complete IEP at that time, no complete IEP was written because the parents wished to discuss reimbursement issues (T-1126, 1133). The LHO erred in concluding (Decision p11) that all aspects of an IEP had been agreed upon as of 3-18-96, and merely needed to be placed in written form. Clearly, a number or the IEP requirements had not been discussed or agreed upon. No complete IEP was arrived at on 3-18-96, and no written IEP was produced or signed by either of the parties based on the discussions on March 18.

d. The LHO erred in concluding that the IEP of 5-17-96 was invalidated because of violations regarding parental involvement in the IEPC Process (Decision p 30). The LHO erroneously concluded that the District wrongfully failed to invite the parents to staff meetings on 4-16-96 and 4-26-96. Those meetings were not IEPC meetings. The meeting on 4-16-96 occurred to present general information to the District staff on DTT methodology (T-1602, 1901-1807). On 4-26-96 District staff met to develop their own recommendations as to goals and objectives and a potential daily schedule program for BJ (T-1289). Those meetings were <u>not</u> IEPC meetings. The IEPC was reconvened on

5-17-96. By letter of 5-6-96. Mr. Greiner forwarded to Petitioners' legal counsel a copy of the District staff's proposal for goals and objectives and daily schedule, so that the parents could review that proposal, and so that the proposal could be discussed fully when the IEPC reconvened on 5-17. The LHO committed error when he determined that the 4-16 and 4-26 meetings were IEPC meetings simply because new proposals emanated from them.

e. The LHO erred when he concluded that a verbal contract / agreement on an IEP made on 3-18-96 had beeen broken (Decision p 31). An IEP is not a contract, and legal theories pertaining to contracts do not apply. Unlike a contract, either party to an IEP may seek changes at any time, and have the appropriateness of those changes reviewed through a due process hearing. Further, an IEP is a written document (see 20 USC 1401(20) R 340.1721e, R. 340.1721d R 340.1722a(2)). Under both Michigan and federal law, a finalized IEP must consist of a written document, and must contain certain information. 20 USC 1401(2)(A)-(F); R 340.1721e(3)(a)(I). Neither Mr. Greiner's 3-6-96 letter nor the proposed program elements presented at the 3-18-96 IEPC meeting included all of the required information. Those proposals did not include objective

criteria and evaluation procedures on schedules for determining whether the instructional objectives were being achieved, the extent to which B.J. was able to participate in regular education programs, or an identification of the LRE and related service options which were considered. Neither the 3-6-96 letter nor the 3-18-96 verbal proposal could properly be considered as a complete IEP. Further the concept of promissory estoppel does not apply to an IEP and no verbal contract / agreement on an IEP was broken by Respondent.

f. The LHO erred in shifting the burden of proof from Petitioners to the District, and further erred in finding the Respondent was required to convince the LHO that a DTT approach (as initially proposed by school personnel on 3-18-96 was not appropriate for B.J. Even if the District bore the burden of proof in this matter, the District's burden would have been to show that the program contained in the 5-17 IEP was appropriate.

g. The LHO erred by failing to consider the requirement that special education programs and services be provided within the LRE.

h. The LHO erred in failing to find that the 5-17-96 IEP provided a FAPE for B.J.

i. The LHO exceeded his authority in requiring Respondent to invite the parents to participate in completing the required open components for BJ's program (Decision p 34). The LHO's recognition that certain required components of an IEP were not developed on 3-18-96 is wholly inconsistent with his conclusion that an IEP had been developed and agreed upon on 3-18.

j. The LHO erred in requiring Respondent to reimburse Petitioners for expenses incurred in providing DTT at home from 3-18-96 to the completion of a transition program from home education to full implementation of an IEP. It is requested that the SHRO address the issues based on the record and take such additional evidence as may be necessary. It is also requested that the . . . LCSD have the opportunity to present written and/or oral argument in this matter.

41. Appeal of petitioners-appellants

Note: Petitioners appeal statements provided that "Petitioners seek to appeal the LHO's decision regarding reimbursement which is discussed at pages 35-36." The statement was repeated for the other issues appealed, but with the applicable page numbers in the LHO's Decision. The SHRO has inserted the pertinent text from the LHO's Decision at each of the truncated appeal statements.

a. Petitioners seek to appeal the LHO's decision regarding Issue No. 1, pages 22-26.

> I. Issue: Were the evaluations conducted by Respondent prior to the development of the IEP here on appeal "appropriate" within the meaning of IDEA and MMSEA.
>
> I. Decision: The LHO finds the evaluations conducted prior to the development of the contested IEP to be appropriate within the meaning of IDEA, MMSEA.
>
> I. Rationale. R 340.1701(h) defines a comprehensive evaluation and (1) defines consent:
>
> (h) "Comprehensive evaluation" means an evaluation that is conducted for the purpose of determining eligibility for special education and related services and for determining the current level of educational performance. The multidisciplinary team, members of the team, the individualized education planning committee, or a hearing officer shall determine the comprehensiveness of an evaluation based on individual needs.
>
> (i) "Consent" means an agreement, in writing, that states all of the following:

(i) The parent has been fully informed, in his or her native language or through another mode of communication, of all information that is relevant ot the activity for which consent is sought.

(ii) The parent understand and agrees to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records, if any, that will be released and to whom.

(iii) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

R 340.1715 (4) Autism defined; determination reads: (4) A determination of impairment shall be based upon a comprehensive evaluation by a multidisciplinary evaluation team. The team shall include, at a minimum, a psychologist or psychiatrist, a teacher of speed and language impaired, and a school social worker.

Rule 340.1721a addresses the evaluation procedure: Rule 21a(1) Each student suspected of being handicapped shall be evaluated by a multidisciplinary evaluation team as defined in R 340.170la(e). Members of the team may include other qualified personnel in areas related to the suspected disability, including, where appropriate, the

following: health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor ability. (2) The multidisciplinary team shall complete a diagnostic evaluation, including a recommendation of eligibility, and shall prepare a written report to be presented to the individualized educational planning committee by the appointed multidisciplinary team member. The report shall include information needed to determine eligibility and educational data which identifies the person's current level of educational performance. Information presented to the IEPC shall be drawn from a variety of sources, including parent input, aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, adaptive behavior, and other pertinent information. No single procedure shall be used as the sole criterion for determining an appropriate educational program for a person.

Respondent's Exhibit 1 is a special education referral and parent permission to evaluate forms signed by Mrs. Burilovich on 10-29-93. Respondent's Exhibit 2 contains the MET report generated on 12-10-93. Inherent to this document are reports and signatures from:

(a) Sue Boyer - Special Education Teacher,
(b) Amy Stamps - School Psychologist,

(c) Lin Gerber Nichols - Speech and Language Pathologist;
(d) Evelyn Griffim - School Nurse and Leslie Rosenwasser - School Social Worker.

The initial IEPC of 12-17-93 placed BJ in a consortium pre-primary (PPI) program operated by the Willow Run School District. No additional evaluations were done by district personnel when BJ transferred to the PPI Program operated by the LCSD in September, 1994; however, another permission to evaluate form was signed on 9-27-94 (P-1 p. 13).

The next evaluation was conducted on 1-31-96 by a home visitation made by a special education team comprised of Ron Greiner, Director of Special Education; Sherry Senunas, SSW; Mary Lupini, school psychologist. The Vineland Adaptive Behavior Scale was administered.

On 2-9-96, a MET convened and wrote a report which concluded that BJ met the criteria for A1. The sources of information listed were (1) a home visitation by SSW, school psychologist and special education supervisor, (2) a University of Michigan Medical report dated 3-25-94 (P-3) along with the MET report of 12-10-93, (3) Completion of the Childhood Autism Rating Scale by team members on 2-5-96, and (4) completion of the Vineland by

the school psychologist at the home on 1-1-96. (R-17). Supplementing the aforementioned evaluations was an Independent Educational Evaluation done by Dr. Meinhold, on 2-2-96 with a written report dated of 3-14-96. This evaluation was ultimately paid for by the district and faxed to the district on 3-18-96 (P-23). The nature and adequacy of the evaluations comport with the meaning and intent of IDEA and MMSEA and are within prescribed timelines.]

b. Petitioners seek to appeal the LHO's decision regarding Issue No. 2.1, pages 26-27.

2.1. Issue of Parental Notification of Procedural Rights

2.1. Decision: The LHO finds no violation regarding parental notification of procedural rights.

2.1. Rationale: The 6th Circuit Court is clear that a party challenging the terms of an IEP bears the burden of proving by a preponderance of evidence that an IEP is defective either procedurally or substantively (Doe v Defendant). In this particular situation, the parents and their counsel failed to carry the burden.

Although Mrs. Burilovich testified that (prior to January, 1996) she never was advised of procedural safeguards and that she never received materials about parental rights (T-115-116, 133). She signed a number of forms indicating that she had, indeed, received this information and/or understood the materials (R-1, 4, 5, 6). She proffered an explanation (i.e.) that she interpreted procedural safeguards as pertaining to physically handicapped children (T-80-81, 657-660).

Lin Nichols, a speech pathologist, testified that procedural rights were discussed with parents, as early as BJ's 1993 IEPC (T- 1461). This was contradicted by her later testimony (T-1611). Other school district testimony indicated that it was routine procedure to send out a handbook of parental rights at the time of the initial referral (T-1093). Testimony from witnesses for both parties continued to vacillate on this issue throughout the hearing.

In two separate cases OCR found that a parents signature on an IEP form acknowledging her rights was significant (Metropolitan Nashville (TN) Public Schools, 24 IDELR (OCR, 1995); Fairfield-??? Suisun (CA) Unified School Districts 21 IDELR 007 (OCR 1994).

> There is an inadequate/insufficient factual basis in the testimony and evidence presented before the LHO to conclude that Petitioners were not informed of their procedural rights; consequently, Petitioners have failed to carry the burden on this issue.]

c. Petitioners seek to appeal the LHO's decision regarding Issue No. 2.2, pages 28-30.

> 2.2. Issue of District Failure to Recertify BJ in a Timely Manner as AI.
>
> 2.2. Decision: The LHO cannot conclude that the District failed to recertify BJ under AI in a timely manner or that such an action denied him of any rights under IDEA or MMSEA.
>
> 2.2. Rationale: BJ was found eligible for special education services on 12-17-93 as Pre-Primary Impaired under R 340.1711. This initial IEP was conducted when BJ was 3-years-and 1 month old. Rule 340.1711 states: "Preprimary impaired" defined; determination. Rule 11.(1) "Preprimary impaired" means a child through 5 years of age whose primary impairment cannot be differentiated through existing criteria within R 340.1703 to R 340.1710 or R 340.1715 to R 340.1715 and who manifests an impairment in 1 or more areas of development equal or greater than ½ of the expected development

for chronological age, as measured by more than 1 development scale which cannot be resolved by medical or nutritional intervention. This definition shall not preclude identification of a child through existing criteria within R 340.1703 to R 340.17100 or R 340.1713 to R 340.1715. (2) A determination of impairment shall be based upon a comprehensive evaluation by a multidisciplinary evaluation team. (3) A determination of impairment shall not be based solely on behaviors relating to environmental, cultural, or economic differences.

The goals and objectives which were developed for BJ on this IEP focused upon speech and language skills as well as socialization/play skills, and related services were provided under R 340.1745 and R 340.1755 (P-2). In March, 1994, BJ was diagnosed a autistic by Dr. Luke Y. Tsai, M.D., University of Michigan Adult/Child Psychiatric Hospitals. One of BJ's teachers from the Willow Run School District was present for part of the time, and she was aware of the diagnosis, as was Mrs. Burilovich (P-3). Considerable time and testimony during this due process hearing was directed towards whether the district had obtained the medical records via Mrs. Burilovich and whether they might have been used to alter programs efforts.

> The IEPC conducted on 10-10-94, B.J. was again found eligible under as Pre-Primary impaired under R 340.1711. He was just under 4 years of age at this time. For all practical purposes, the goals and objectives again focused upon speech and language as well as following classroom routine. BJ was to attend the PPI program 2.5 hours a day, 4 days a week. Direct speech and language therapy (R 340.1745) was to be provided from 40-80 minutes a week. Mrs. Burilovich signed the IEPC document in agreement and she did not contest PPI eligibility.
>
> Pre-Primary Impaired, as defined, means a child through 5 years of age. It does not preclude identification of a child through other criteria. (R 340.1703 to R 340.1710 or R 340. 1713 to R 340.1715), but the Rules do not require it either. It is highly unlikely that a reclassification of, B.J. as autistic would have altered his needs or elicited a different program. Mrs. Burilovich was a part of the decision making process and signed in agreement (See Decision 2.1).]

d. Petitioners seek to appeal the LHO's decision regarding reimbursement, pages 35-36.

> D. <u>REIMBURSEMENT</u>. The district will reimburse Petitioners for the expenses incurred in providing DTT at home for BJ from 3-18-96

to the completion of the transition program from home training to full implementation of his LEP. (This date is to be determined).

Discussion: The U.S. Supreme Court's Burlington decision US 359, 105 S.Ct 1996, 85 L.Ed2d 385, 23 Ed Law Rep. 1189 (1985) upholding a lst Circuit decision that IDEA allowed reimbursement to parents if the parent's selected placement was determined to be appropriate. The Court warned, however, that parents who make unilateral placements do so at their own financial risk since the reimbursement is predicated upon finding (a) the school district's IEP inappropriate, and (b) the programs and services selected by the parents were "proper under the Act", i.e., reasonably calculated to provide educational benefit.

The Burlington decision was expanded in Florence County School District v--, 950 3.2dl56 (4th Cir. 1991) aff'd 114 S.Ct. 361 (1993) and OSEP Memorandum 94-14, 20 IDELR 1180 (1994).

The LHO determined the IEP of 5-17-96 to be inappropriate, and that the services procured by the parents were reasonably calculated to provide educational benefit; consequently, reimbursement is awarded for the time frame indicated in this directive. Prior to the 3-18-96

IPEC meeting, the parents did not establish that school programming violated procedural safeguards nor that such programming was inappropriate. Mrs. Burilovich had been a part of the decision making process as well as a factor in delaying the convening of a new IEPC (P-6-12). Reimbursement for expenses incurred prior to 3-18-96 is denied.

D. PROCEDURAL MATTERS

42. The following procedural matters relating to the hearing are herewith noted.

a. Time period for filing of decision of the SHRO: 45-day rule: The hearing spanned 159 days from the time of the request (5-23-96) to the date that the decision was rendered (10-29-96). Neither party requested an extension of time.

b. Time period (for filing of decision of the SHRO: 30-day rule: The SHRO received the hearing record on 1-22-96. The record was incomplete, and required that missing items be gathered. This was especially important since the missing LHO exhibits contained the exhibit upon which the LHO ruled procedural violation, that caused him to invalidate the challenged IEP, and to shift the burden of proof to Respondent. Certain procedural matters intervened, viz., a motion for recusal from Petitioners, and an SHRO order to Respondent to proceed to a court of competent jurisdiction for a ruling on promissory estoppel applied to the IEPC process. The size and scope of the record consists of the LHO's decision of 38 pages, a transcript of 2043 pages, Petitioners'

48 documentary exhibits comprising 319 pages, Respondent's 33 exhibits of approximately 225 pages, 21 exhibits from the LHO, and the parties' briefs on appeal, each consisting of 30 or more pages. For these reasons this decision is delayed. The time for filing this decision is ordered extended 20 days.

c. Disclosure (SHRO-9): i) The SHRO, like the LHO, is not an attorney, but a State-approved, State-trained, and otherwise qualified hearing officer.

ii) Petitioners requested the disqualification of SHRO (SHRO-9), citing MSER 25e(1)(2). The SHRO presented an affidavit (SHRO-9) to the parties in which he attested to his impartiality. Petitioners' alleged a "palpable" bias on the SHRO's part. The SHRO categorically attested that he holds no negative bias toward DTT, neither in the past nor at present. The SHRO also affirmed in the negative the following five elements of impartiality: a) Any personal bias toward a party in this matter. None; b) Any personal knowledge of disrupted evidentiary facts. None; c) Any service or representation of a party to the case. None; d) Any personal, family, financial or other interests in the case. None; e) Any relationship within the 3rd degree with a party or lawyer. None. In keeping with 34 CFR §300.507, the SHRO affirmed in the negative: a). Any employment by the public agency which is involved in the education or care of the child. None; b) Education or care of the child. None; c) Any personal or professional interest which would conflict with objectivity in the hearing. None.

d. Stay put, MSER 25c(1): The LHO failed to consider the stay put provision for BJ. The Rule 25c requires that the

person involved in the hearing shall remain in their present educational placement. In BJ's case, the placement as specified in the IEP of 10-05-94 is the stay-put, not the home program in which Petitioners unilaterally and voluntarily placed him without recourse to an IEPC meeting. Note 35 in Appendix C to 34 CFR Part 300 advises:

> If parents and the agency are unable to reach agreement at an IEP meeting, what steps should be followed until agreement is reached? As a general rule, the agency and parents would agree on an interim course of action for serving the child (i.e., in terms of placement and services) to be followed until the area of disagreement over the IEP is resolved. The manner in which this interim measure is developed and agreed to by or parties is left to the discretion of the individual State or local agency. However, if the parents and the agency cannot agree on an interim measure, the child's last agreed upon IEP would remain in effect in the areas of disagreement until the disagreement is resolved . . . .

e. Incomplete record -- Missing items. On 1-22-97 the SHRO received via UPS (Shipper Number MI-452-650), a package purported to be the record of the hearing. The contents upon inventory, included only the following items: 1) The transcript in 9 volumes. 2) Respondent's exhibit book, with exhibits 1 through 33, with none of the exhibits marked as having been admitted into evidence. 3) Petitioners' exhibit book, with exhibits 1 through 51 with none of the exhibits

marked as having been admitted in evidence. (Neither exhibit book contains any marked exhibits.) 4) Correspondence dated 11-22-96 (received 11-27-96), Landau to Nester (now SHRO-I). 5) Respondent's appeal of the LHO's decision, dated 11-25-96 (now SHRO-2). 6) Correspondence dated 12-3-96, Nester to Landau and Eschelbach re receipt of appeal (now SHRO-3). 7) Correspondence dated 12-3-96, Nester to Gottwald re appeal of the decision. (now SHRO-4). 8) Correspondence dated 12-13-96 (received 12-17-96), Landau to Rowell, with completed MDE appeal form and specifications attached (now SHRO-5). 9) Correspondence dated 1-16-97, Nester to Eschelbach and Landau re appointment of Sosnowsky as SHRO (now SHRO-6);

The inventory revealed that the following items were missing: 1) All 21 of the LHO's exhibits, viz., la through 20; 2) Petitioners' exhibits P-49 (video-tape in home), P-50 (video-tape in school), P-51 (audio-tape). These audio and video tapes were played during the hearing proceedings; 3) Petitioners' exhibit no. 20; 4) The post-hearing briefs of both Petitioners' and Respondent (noted in the transcript at p2041) (HO-9 and 10). Ultimately all of these items were found and delivered to the SHRO.

f. Briefs re the LHO's denial of Respondent's motion to observe and video-tape BJ at his home program: After failing to gain permission from Petitioners to observe and video-tape BJ in his home program prior to the IEPC meeting scheduled for 5-17-96, Respondent petitioned (T-16-25, 49, 218) the LHO to permit a video-taped observation of BJ at his DTT activities. The LHO had counsel present briefs on the issue. At the end of the 4th session of the hearing (9-13-96) the

LHO stated that he had reviewed the briefs, and "without question [he was going] to deny that request" (T-833). He also said that he would "spell out why" at the "opening of our next session" (T-34). He did not do so then or ever, nor did he do so in his Decision. Furthermore, these briefs are the only two remaining items missing from the record.

g. LHO interventions: The LHO intervened substantively at least 210 times during the course of the hearing, often as witnesses were being examined. The interventions span a few lines to as many 11 pages (at volume VIII). These interventions are exclusive of those that were necessary for the conduct of the proceedings.

h. Hearsay: The LHO inconsistently denied acceptable hearsay testimony upon objection.

i. The LHO failed to resolve this matter.

I. Findings of fact

a. "Open components" as used by the LHO, and to which he references MSER 2le (3) (a) through (i), the specifications for an IEP, is a circumlocution, that avoids requiring an IEPC meeting outright. None of the specifications for an IEP are excluded, but inconsistently modified by his 10-point "Directive" (Decision, p34-35).

b. The LHO inadvertently recognized in his "Directive" (Decision, p34) the nullity he erroneously considered to be an IEP (the oral proposal of 3-18-96), and upon which he

improperly nullified the challenged IEP and improperly shifted the burden of proof to Respondent.

c. He ordered Respondent (Decision, at IV.B. pp34-35) to "invite the parents to participate in completing the required open components for BJ's program. These are specified under R 340.1721e(3) to include . . . ." The title of Rule 21e is the "Individualized educational planning committee meeting; determination of eligibility for special education programs and services; individualized education program."

d. The LHO listed the elements of Subsection (3), (a) through (i), (though incorrectly), which constitute the sum and substance of the content of an IEP. (T-35)

e. In addition, he further requires that *the IEPC* [emphasis added], here again acknowledging the nullity of the nonexistent IEP of 3-18-96), "will utilize Chapter V of the Report of the Committee on 'Lovaas Style' Interventions [P-46] to ascertain completeness of the IEP (Decision, pp34-35).

II. Conclusions of law

a. The purpose of a hearing is to resolve all issues. Thus, since significant "open components" remain after the hearing has been held to resolve all issues, then the LHO has failed in his prime responsibility.

b. The LHO left major issues unresolved: 1) he required what is tantamount to a new IEP, 2) he required that the latter procedure be further subject to an additional IEPC-like

process based on an unofficial report, and 3) he failed to set a precise deadline for the completion of a transition program.

c. Rowley directs that "Complaints brought by parents or guardians must be resolved at an 'impartial due process hearing,'" (Rowley, at 3039). However, the LHO, apparently to avoid stating that a new IEP was to be developed and to circumvent a new IEPC used the phrase "open components" and listed the requirements of MSER 21e (3) (a) to (i). Thus, in effect the LHO has ordered a new IEP, and a new IEPC meeting with certain constraints imposed. The LHO further required that the IEPC conform with an informal, unofficial report (P-46), unsanctioned by the State Special Education Advisory Committee, the State Board of Education, or the Department of Education. (Decision, Section C, pp34-35). Furthermore, in the dicta on the reimbursement issue, the LHO ordered reimbursement for expenses incurred from 3-18-96 and then prospectively, "to the completion of the transition program from home training to full implementation of his IEP. This date is yet to be determined." Thus, LHO has failed with a threefold irresolution of this matter. His holdings not only fail to finalize the matter, but leave them egregiously unresolved.

E. DECISION OF THE STATE HEARING REVIEW OFFICER

43. This review engages in a 2-step inquiry established in Rowley. The first step seeks to determine whether the state complied with the act's procedural requirements, the second step seeks to determine whether the IEP is in substantive

compliance with IDEA as being reasonably calculated to enable the child to receive educational benefits.

44. ROWLEY TEST, STEP 1: COMPLIANCE WITH PROCEDURAL REQUIREMENTS. IS THE IEP IS PROCEDURALLY DEFICIENT? Sec 1401(a)(20) require assurance that the procedural safeguards are met. The procedural requirements set forth in Section 1415 (b)(l)(C) and (E), include, the opportunity for parents of a handicapped child to examine all relevant records regarding the educational placement, to obtain an IEE of the child, to provide prior written notice to the parents whenever it proposes to change or refuses to change a child's placement. Parents are guaranteed the opportunity to present complaints with respect to any matter concerning the child's placement. When a complaint is filed, parents are entitled to an impartial due process hearing. If such hearing is conducted by a LEA, an aggrieved party may appeal the decision to the SEA for an independent review, as done here. A party aggrieved by the decision of the SEA may file a civil action in Federal District Court 1415(e)(2).

45. Issue I. DID THE LHO ERR IN FINDING NO VIOLATION REGARDING PARENTAL NOTIFICATION OF PROCEDURAL RIGHTS (LHO DECISION, AT "DECISION", P 26)?

a. DECISION

1. The LHO correctly found that no violations exist regarding notice to Petitioners of their procedural rights. The LHO correctly concluded that the evidence in this case

establishes that Petitioners were repeatedly provided notice and copies of their rights, as well as copies of those rights. The ruling is affirmed.

b. Findings of fact

1. Dr. Burilovich claims that no one had called her attention to the due process rights printed on the IEP forms. SLT Lin Nichols, who was present at both the 1993 and 1994 IEPC meetings, confirmed that at such meetings District personnel routinely informed Petitioners of those procedural safeguards (T-1459, 1460-1461, 1610-1611).

2. Although Dr. Burilovich testified that (prior to January 1996) she was never advised of procedural safeguards, and that she did not receive any materials regarding parental rights (T-115-116, 133), she had signed a number of forms indicating receipt of, as well as, understanding of such notice (R-1, R-4, R-5, R-6). SLT Lin Nichols testified that procedural rights were discussed with Petitioners as early as 1993 at BJ's initial IEPC (T-1461).

3. When Dr. Burilovich signed BJ's IEPs in 1993 and 1994, she indicated specifically that she had "received and been informed of all procedural safeguards" (P-2, P-6). She acknowledged that her due process rights were included on the back side of the 1993 and 1994 IEP forms which she had received (T-660).

4. Dr. Burilovich, on the 12-07-93 IEP, initialed in agreement that she had received and had been informed of her rights and procedural safeguards. (T-660,790).

5. Dr. Burilovich proffered the explanation that she had interpreted procedural safeguards as pertaining to physically handicapped children (T-80-8 I, 657-660). She acknowledges that she never asked what that phrase meant (T-659).

6. At IEPC meetings held by Respondent, Petitioners were routinely reminded of the procedural safeguards (T-1459, 1460, 1461, 1610-1611).

7. Director Greiner and District personnel testified that the routine procedure was to provide parents with a handbook outlining procedural rights at the time of the initial referral (T-738,792ff, 1093, 1459).

8. Contrary to the LHO's comment that "testimony from witnesses for both parties vacillated on this issue throughout the hearing", Respondent's witnesses were unequivocal about having addressed Petitioners' procedural rights at meetings, and having initially provided them with a handbook that details rights and procedural safeguards. (T-1460, 1465, 1610).

9. Furthermore, although Dr. Burilovich claims that she first became aware of her special education procedural rights during the Fall 1995 (T-152), she did not mention this at the 12-01-95 IEPC meeting (nor at any subsequent meeting) (T-1111).

10. In January 1996, Mr. Greiner forwarded a copy of the parent handbook (including a description of procedural/due process rights) to Petitioners' attorney in response to counsel's request on behalf of Petitioners for an IEE (see R-13).

11. The record discloses no attempt by Petitioners, at any time, to seek solutions to their perceived violation of rights. Petitioners never requested an IEPC meeting, they did not pursue mediation, and they did not pursue the Michigan special education complaint process, MSERs Part 8.

c. Conclusions of law

1. Where parents actively participate in the development of a child's IEP and are aware of relevant information, then technical violations of IDEA are not sufficient to render an IEP inappropriate or to establish the denial of a FAPE. Hiller v Bd. of Educ. of Brunswick Cent. Sch. D., 743-F Supp 958 (ND NY 1990). See also Max M. v Illinois State Bd. of Ed., 629 F Supp 1504, 1517-18 (ND Ill. 1986); Chuhran v Walled Lake Consol. Schools, 839 F Supp 465 (ED Mich. 1993).

2. In two separate cases OCR found that a parents signature on an IEP form acknowledging her rights was significant (Metropolitan Nashville (TN) Public Schools, 24 IDELR (OCR, 1995); Fairfield-Suisun (CA) Unified School Districts 21 DELR 1007 (OCR 1994). OCR found that the parent's signature on the student's IEP acknowledging that her rights had been explained was significant in this regard. In Fairfield -Suisun, the parent claimed that the school district failed to inform her of her due process rights. The district responded

that it had informed the parent of her rights by listing parental rights on the back of the IEP form provided to parents. Although the parent acknowledged receiving the IEP form, she stated that the district never informed her that the rights were included on the form, and she never read the back of the form. The OCR found that there was an insufficient factual basis to determine that the parent was not informed of her rights and ruled in favor of the school district.

46. Issue II. FACTORS IN DELAY

a. DECISION

1. The LHO erred in funding that after Petitioners' request to delay the annual IEPC review meeting, the IEPC meeting was first rescheduled for 11-10-95.

2. The LHO erred in finding that Petitioners presented a list of simple requests at the IEPC meeting of 12-01-95. Petitioners presented a list of demands.

3. The LHO failed to determine that Petitioners unilateral and voluntary removal of BJ to their home program constituted a private placement, and thus, Respondent was not required to make FAPE available to BJ.

b. Findings of facts

1. The purpose of the meeting scheduled for 11-10-95, as Dr. Burilovich testified was: ". . . to meet with Mr. Greiner and Betsy McMillan, and they had asked for the meeting. I guess

the purpose was to talk about BJ." (P-7; T-152). A scheduled IEPC meeting was postponed by Petitioners (P-7).

2. As to other factors in the delay of the IEP process:

3a. The IEPC meeting of 12-01-95 did not result in an IEP because Petitioners were unwilling to discuss appropriate goals and objectives with school representatives (T-1075). Rather, Petitioners demanded that the goals for BJ be developed by a Lovaas-style-DTT-trained person such as Dr. Meinhold (T-169, 1483). Petitioners also presented, at the 12-01-95 IEPC meeting, a list of six demands, five of which were monetary considerations: (A) Funding for one full calendar year for BJ's Lovaas program at 40 hours a week, including workshop fees (with travel expenses thereto) and costs of student therapists and supplies. (B) Reimbursement of l) for expenditures for B.J's "home therapy" program, 2) for transportation expenses, 3) for legal expenses, and C) for auditory integration training for BJ. (P-11; T-728, 1075, 1478, 1480, 1483). Petitioners announced, at this session, the unilateral withdrawal of BJ from the PPI program the (T-1578).

3b. The lEPC process was delayed further as a result of the parents' request for an IEE. Through their attorney, Petitioners indicated they wanted the IEPC to reconvene after the completion of the IEE (see Parent 15). That IEE was provided to director Greiner on the morning of the day that the IEPC was to be reconvened, i.e., the afternoon of 3-18-96.

3c. During the first two weeks of March 1996, Petitioners introduced BJ to a new approach, viz., auditory integration training; T-622, 741). The District deferred to that activity undertaken by Petitioners. Thus, the IEPC meeting was delayed approximately 5-1/2 months due to Petitioners actions / requests.

3d. The 2-month delay in finalizing the IEP (from 3-18-96 to 5-17-96) was partly due to the staff's need to review and revise Respondent's proposal, and to provide an opportunity for Petitioners to review that proposal, before reconvening the IEPC meeting on May 17. Petitioners were also provided time to compile the documentation to support their reimbursement claims (R.-24), and subsequently to permit Respondent to review Petitioners' extensive documentation.

3e. During the period from October 1995 through May 1996, BJ's prior lEP (10-05-94) remained in effect. Petitioners, however, chose, voluntarily and unilaterally, to withdraw BJ from the special education PPI program and the related services of speech and language therapy and occupational therapy as well. Respondent was willing to provide special education programs and services pursuant thereto.

3f. Petitioners sought an IEE (12-28-96). The IEE report was presented to Respondent on 3-18-96, the day that an IEP was scheduled..

3g. A series of telephone conferences followed the 12-01-95 IEPC meeting between the director Greiner and Petitioners. That activity was followed up with correspondence between the parties.

3h. The SHRO concurs with the LHO that Dr. Burilovich had been a part of the decision making process as well as a factor in delaying the convening of a new IEPC. (P-6 through P-12) (Decision, p36). The record shows that Respondent proactively attended to the IEPC process, in accordance with Petitioners desires that required the funneling of communication with them and their psychologist, through their attorney.

c. Conclusions of law

1. Home based education qualifies as enrollment in private school. Edgerton Sch. Dist., 20 IDELR 126 (SEA Wis. 1993); Letter to Williams, 18 IDELR 742 (OSEP 1992). A public agency is not required to make FAPE available to a child at a private school but is required to make FAPE available if that child returns to public school and to provide parentally placed children residing in its jurisdiction with "a genuine opportunity for equitable participation" in programs of special education and related services. McNair v Cardimore, 1987-88 EHLR 559:289 (S.D. Ohio 1987). FAPE was available by means of the stay-put IEP.

2. Respondent is not required to honor parent expectations that are out of the ordinary. Neither is Respondent required to acquiesce to parental choice. OSERS in Verganson (17 EHLR 471, OSERS 1990) and Burton (17 EHLR 1182, OSERS 1991) provide that although parental choice is not required under Part B, the use of parental choice is permissible if the agency determines that the placement selected provides FAPE and otherwise meets Part B requirements. Thus if an IEPC determined that more than one

option would provide an appropriate program for a child, it would be allowable for the parents to choose between those options. However, OSERS warns that permitting placement solely on the basis of parent choice without regard to an IEP, violates Part B (34 C.F.R. 300.352 (a) (2).

47. Issue III. DID THE LHO ERR IN FINDING THAT THE EVALUATIONS CONDUCTED PRIOR TO THE DEVELOPMENT OF THE CONTESTED IEP ARE APPROPRIATE WITHIN THE MEANING OF IDEA, MMSEA?

a. DECISION

1. The LHO did not err in finding that the evaluations conducted prior to the development of the contested IEP are appropriate within the meaning of DEA, MMSEA. The ruling is affirmed.

b. Findings of fact

t. Respondent's evaluations of BJ prior to the 5-17-96 IEP were appropriate.

2. Dr. Burilovich signed (10-29-93; R-l) a special education form for referral and permission to evaluate on 10-29-93, which resulted in a MET report (R-2; 12-10-93).

3. The MET report contains five individual reports from the following evaluators:

Sue Boyer - Special Education Teacher,

Amy Stamps - School Psychologist,
Lin Gerber Nichols - Speech and Language Pathologist,
Evelyn Griffin - School Nurse and
Leslie Rosenwasser - School Social Worker.

4. The initial IEPC (12-17-93) placed BJ in a consortium pre-primary (PPI) program operated by the Willow Run District. Petitioners again signed their permission to evaluate (9-27-94; P-1).

5. The next evaluation was conducted on 1-31-96 at Petitioners' home by Respondent's team comprised of Ron Greiner, Director of Special Education; Sherry Senunas, SSW; and Mary Lupini, school psychologist. On 2-9-96, a MET convened and reported that BJ met the criteria for AI (MSER 15). The sources of information listed were (1) a home visitation by a SSW, school psychologist and a special education supervisor; (2) A report (P-3) from the Developmental Disabilities Clinic of the University of Michigan Hospital dated 3-25-94; (3) the MET report of 12-10-93; (4) the results of the Childhood Autism Rating Scale completed by the team on 2-5-96; and (5) the results of the Vineland Adaptive Behavior Scale by the school psychologist completed on 1-1-96. (R-17).

c. Conclusions of law

1. MSER 1(h) defines a comprehensive evaluation

> "Comprehensive evaluation" means an evaluation that is conducted for the purpose of

determining eligibility for special education and related services and for determining the current level of education performance. The MET members of the team, the IEPC, or a hearing officer shall determine the comprehensiveness of an evaluation based on individual needs.

2. MSER 15(4) Autism defined; determination:

A determination of impairment shall be based upon a comprehensive evaluation by a MET. The term shall include, at a minimum, a psychologist or psychiatrist, a teacher of speech and language impaired, and a school social worker.

3. MSER 21a (1):

R 340.172la Evaluation procedure. Rule 2la (1) Each student suspected of being handicapped shall be evaluated by a multidisciplinary evaluation team as defined in R 340.1701a(e). Members of the team may include other qualified personnel in areas related to the suspected disability, including, where appropriate, the following: health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor ability. (2) The multidisciplinary team shall complete a diagnostic evaluation, including a

recommendation of eligibility, and shall prepare a written report to be presented to the individualized educational planning committee by the appointed multidisciplinary team member. The report shall include information needed to determine eligibility and educational data which identifies the person's current level of educational performance. Information presented to the individualized educational planning committee shall be drawn from a variety of sources, including parent input, aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, adaptive behavior, and other pertinent information. No single procedure shall be used as the sole criterion for determining an appropriate educational program for a person. 3) When evaluating a person suspected of being handicapped, the public agency shall assure that tests and other evaluation materials used by members of the multidisciplinary team comply with all of the following provisions: (a) Are administered by trained personnel in conformance with the instructions provided by their producer. (b) Are validated for the specific purpose for which they are used. (c) Are designed to assess specific areas of educational need and not merely to provide a general intelligence quotient. (d) Are reflective of the person's aptitude or achievement or whatever other factors the test purports to measure rather than

reflecting the person's impaired sensory, manual, or speaking skills, unless this is what the test is intended to measure. (e) Are selected and administered so as not to be socially or culturally discriminatory. (4) When evaluating a person suspected of having a specific learning disability, at least 1 team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting. In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age. (5) The multidisciplinary evaluation team evaluating a person suspected of having a specific learning disability shall complete a written report which shall include, at a minimum, all of the following: (a) A recommendation of eligibility and the basis for making this recommendation. (b) The relevant behavior noted during the observation of the child and the relationship of that behavior to the child's academic functioning. (c) The educationally relevant medical findings, if any. (d) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education. (e) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage. (f) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his

or her conclusion, the team member shall submit a separate statement presenting his or her conclusions. (6) When evaluating a person suspected of being emotionally impaired, the multidisciplinary team report shall include documentation of all of the following: (a) The person's performance in the educational setting and in other settings, such as adaptive behavior within the broader community. (d) The systematic observations of the behaviors of primary concern which interfere with educational and social needs. (c) The intervention strategies used to improve these behaviors, and the length of time these strategies were utilized. (d) Relevant medical information, if any. (7) For visually impaired students who have a visual acuity of 20/200 or less after routine refractive correction, or who have a peripheral field of vision restricted to not more than 20 degrees, an evaluation by an orientation and mobility specialist shall be conducted. The orientation and mobility specialist shall also include in the report a set of recommended procedures to be used by a mobility specialist or a teacher of the visually impaired in conducting orientation and mobility training activities. (8) The parent or legal guardian shall inform the school district of the student's native language when giving consent to evaluate the student. Tests and other evaluation materials shall be provided and shall be administered in the student's

native language, unless it is clearly unnecessary to do so. When evaluation in English is not feasible, the public agency shall do all of the following: (a) Give first consideration to evaluative personnel who are competent in English and in the native language and culture of the student. (b) When needing an interpreter, contract with a bilingual/bicultural psychologist trainee, an intern currently enrolled in a professional training program, or a person who is competent in English and in the native language and culture of the student. (c) Provide interpreters for the deaf where appropriate. (9) A vocational evaluation shall be conducted before a handicapped student receives vocational education. The evaluation shall be conducted by personnel qualified to administer and interpret the particular evaluations used. (10) Special education personnel who are authorized to conduct evaluations of students suspected of being handicapped may provide pre-referral consultation to regular education personnel in accordance with procedures established by the department.

48. Issue IV. DID THE LHO ERR IN NOT CONCLUDING THAT 1) RESPONDENT FAILED TO RECERTIFY BJ UNDER AUTISM TIMELY, AND, IF IT DID SO ERR, WERE ANY RIGHTS DENIED HIM?

a. DECISION

1. The LHO did not err in concluding that Respondent 1) had not failed to recertify BJ timely under autism.

2. BJ was not denied any rights.

b. Findings of fact

1. BJ was initially found eligible, at the age of 3 years and one month, for special education and related services on 12-17-93 as PPI (MSER 11).

2. The goals and objectives developed for BJ focused on speech and language skills, on socialization, and on play skills. Related services were provided under MSERs 45 and 55.

3. In March 1994, BJ was diagnosed autism by Luke Tsai, M.D., Professor of Psychiatry, and Director, Developmental Disabilities Clinic, University of Michigan Adult/Child Psychiatric Hospitals. (P-3).

48. The IEPC meeting of 10-10-94, again found BJ eligible for PPI. He was just under 4 years of age. The goals and objectives continued to focus on speech and language, and on following classroom routine. Dr. Burilovich signed the IEPC document in agreement, and did not contest the PPI eligibility or placement. (Decision, p29).

c. Conclusions of law

1. MSER 11 states:

> "Preprimary impaired" defined; determination. (1) "Preprimary impaired" means a child through 5 years of age whose primary impairment cannot be differentiated through existing criteria within R 340.1703 to R 340.1710 or R 340.1713 to R 340.1715 and who manifests an impairment in 1 or more areas of development equal to or greater than ½ of the expected development for chronological age, as measured by more than 1 developmental scale which cannot be resolved by medical or nutritional intervention. This definition shall not preclude identification of a child through existing criteria within R 340.1703 to R 340.17100 or R 340.1713 to R 340.1715. (2) A determination of impairment shall be based upon a comprehensive evaluation by a MET.

2. PPI addresses children through 5 years of age. It does not preclude identification of a child through other criteria, (R 340.1703 to R 340.1710 or R 340.1713 to R 340.1715), but the Rules do not require it either.

49. Issue V. DID THE LHO ERR IN RULING THAT A "VERBAL CONTRACT / AGREEMENT" [sic] HAD BEEN MADE AT AN IEPC MEETING IN PROGRESS ON 3-18-96, AND THAT IT HAD BEEN BROKEN.

49 A. DID THE LHO ERR IN CONCLUDING (1) THAT ALL ASPECTS OF AN IEP HAD BEEN AGREED UPON AS OF MARCH 18, 1996, AND (2) THAT IT MERELY NEEDED TO BE REDUCED TO WRITTEN FORM?

a. DECISION:

1. The LHO erred in concluding (l) that all aspects of an IEP had been agreed upon as of March 18, 1996, and (2) in further concluding that it merely needed to be reduced to written form. The IEPC meeting of 3-18-96 produced no IEP.

2. The LHO erred in finding that director Greiner's letter of 3-6-96 (R-19), outlined a FAPE.

3. The LHO erred in ruling that a verbal contract / agreement had been made at the IEPC meeting of 3-18-96. The meeting of that date ended unresolved. The ruling that a verbal contract had been made is set aside.

4. The LHO erred in ruling that a verbal contract / agreement had been broken. The ruling is set aside. The ruling that a verbal contract had been broken is set aside.

b. Findings of fact:

1. No complete or written or formal IEP issued forth from the IEPC meeting of 3-18-96. The LHO refers to a nullity at mention of an "IEP of 3-18-96".

2. Director Greiner orally outlined a program proposal for BJ at the 3-18-96 IEPC meeting.

3. Neither the outline of proposed program elements set forth in director Greiner's 3-06-96 letter nor the program elements orally outlined by him at the 3-18-96 IEPC meeting included all of the required information to satisfy the requirements of an IEP. Specifically, the proposal addressed the following matters: 1) redetermination of eligibility, 2) assignment of a 1:1 paraprofessional, 3) annual goals and short term objectives, 4) a transition plan, 5) home-school coordination, 6) integration into a kindergarten classroom, 7) agreement to pay for DTT training, 8) agreement to pay for the IEE, 9) periodic consultation and monitoring regarding DTT, and 10) consideration of an ESY. It did not include any of the following requirements for an IEP: Objective criteria and evaluation procedures, schedules for determining whether the instructional objectives were being achieved, the extent to which B.J. was able to participate in regular education programs, the least restrictive environment, or related service options. (P-29; and excerpted at pp8-10)

c. Conclusions of Law

1. Mr. Greiner's 3-18-96 proposal outline at the IEPC meeting of that date could not be considered formal IEP. The requirements for an IEP to be in compliance are set forth in MSER 21e (3).

2. In any situation, especially a highly charged one such as the instant one is, where negotiation is conducted (a substantial monetary settlement attempt was being negotiated

here), agreements are ephemeral until reduced to writing, and in this context the writing of an IEP. No IEP was written.

3. The LHO's decision on promissory estoppel relied on exhibits HO-16 through HO-19 (Decision, pp31-32) and on the testimony of director Greiner (T-807-819, 1222,). The LHO relied on Parkhurst Hanes, Inc. v. McLaughlin, 187 Mich. App. 357, 360, 466 N.W. 2d 404-1991 (Decision, p 31).

4. The LHO ruled that, "A verbal contract / agreement on an IEP has been broken" (Decision: Issue 3.0, Decision, p31). The LHO further stated that, "It should be noted that absent promissory estoppel, the procedural violations would still invalidate the IEP of 5-17-96 and place the burden of proof upon the school district." (Decision, p 33). Here the LHO pluralized the single violation that served as the basis for his erroneous conclusion of its existence (see Decision on issue 2.3. p30), viz., that certain staff meetings were IEPC meetings to which Petitioners had not been invited. On the basis of that sole and erroneously detrained violation, he invalidated the 5-17-96 IEP and shifted the burden of proof from Petitioners to Respondent. Both actions were executed post-hearing. Without specification or elaboration, the LHO said, "This agreement is a matter of record and was cited earlier in this decision." (Decision, p 32). At later points in his decision, the LHO inflated his characterization of "this agreement", to the status of an IEP. The LHO continued: "Albeit the IEP document was not signed due to the reimbursement issue, there was agreement upon the program." (Decision, p 32). He then said, "Moreover, what currently constitutes an appropriate IEP for BJ should not be

compromised by linkage to issues of reimbursement for past expenditures!" [sic] (Decision, p 32). The LHO fails to note in both instances set forth here, that the IEPC of 3-18-96 was adjourned without resolution, that it was adjourned because Petitioners refused to finalize the IEP until their reimbursement was settled, no "IEP document" issued forth, none exists, and that nullity cannot be considered as "what currently constitutes an appropriate IEP." LHO erred in failing to note that Petitioners, not Respondent, juxtaposed the reimbursement issue against the action of formalizing the IEP at the IEPC meeting of 3-18-96. Their acceptance of the proposal was conditioned entirely on their reimbursement issue.

5. The LHO listed the elements of promissory estoppel: l) a promise; 2) That the promisor reasonably should have expected to induce action of a definite and substantial character on the part of the promisee; 3) which in fact produced reliance or forbearance of that nature, and; 4) in circumstances requiring that the promise be enforced if injustice is to be avoided." As to these, he exclaimed, "All of the elements for promissory estoppel were/are evidenced !" [sic] (Decision, p 32), but he provided no evidence or substance of any sort to support his exclamation. He failed to state what the promisor reasonably should have expected to induce action of a definite and substantial character on the part of the promisee (the second element of promissory estoppel), he failed to state what it was that produced Petitioners' reliance or forbearance of that nature (the third element), and he failed to state the circumstances requiring that the promise be enforced and what injustice is to be avoided (the fourth and last element of promissory estoppel).

6. Petitioners addressed the elements of, estoppel, alleging, in their brief, on appeal (ppl8-19), that the promissory estoppel is based on the following: That director Greiner l) clearly made a promise of educational services which was intended by him to represent the District's offer of an "appropriate program" for B.J. 2) It was intended to induce and did in fact induce action and forbearance of action on the part of, the parents. A training session was scheduled and the parents refrained from arranging for alternative socialization experiences for BJ pending the implementation of the proposed program (P-25). 3) If Mr. Greiner's promise of a program is not enforced, an injustice will have been done in that his deceptive conduct will benefit Respondent by allowing it to shift the burden of proof to the parents. However, Respondent had previously offered to have Dr. Meinhold provide training. Director Greiner, said in a letter (R-19 3pp; dated 3-6-96) to Petitioners' attorney, (p2) regarding that training: "You indicated that you would prefer convening an IEPC meeting before Dr. Meinhold trains staff. I indicated that the District was willing to commit to the training and pay for it. My concern was that if we delay the training, we will, in effect delay the implementation of the IEPC report because, as I indicated from my attempt to schedule the 3-18 training with Dr. Meinhold, she is extremely busy. You indicated that your first preference is to convene the IEPC meeting."

7. The LHO finally, though inadvertently, recognized in his "Directive" (Decision, p34) the nullity of what he erroneously considered to be an IEP (an oral proposal made on 3-18-96 during an IEPC meeting). He did so when he ordered Respondent (Decision, at IV.B. pp34-35) to "invite the parents to participate in completing the *required open*

components [emphasis added] for BJ's program. These are specified under R 340.1721e(3) to include . . ." The title of MSER 2le is the "Individualized educational planning committee meeting; determination of eligibility for special education programs and services; individualized education program." The LHO listed the elements of, Subsection (3), (a) through (i), (incorrectly at (h) and (i)). These elements constitute the sum and substance of the content of an IEP. In addition, the LHO further required that *the IEPC* [emphasis added], here again acknowledging the nullity of the nonexistent IEP of 3-18-96, and the requirement of a new IEPC for the "open components"), "will utilize Chapter V of the Report of the Committee on 'Lovaas Style' Interventions [P-46] to ascertain completeness of the IEP (Decision, pp34-35).

8. MSER 2le specifies that an IEP is a written document. Similarly, MSERS 21d and 22a (2) refer to the IEPC "report". The Department's Official Interpretation I-121 (of, 3-23-83) notes that an IEP is intended to "record" decisions related to a student's needs, *and that upon completion the IEPC* [emphasis added] becomes a "document" of accountability. IDEA in 20 USC 1401(a)(20) defines IEP as follows:

> The term "IEP" means a written statement . . . developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provisions of, specially designed instruction to meet the unique needs of children with

> disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child. Furthermore, an IEP must contain certain information. (20 USC 1401(2)(A)-(F); R 340.1721e(3)(a)-(i)).

9. Reliance on the concept of promissory estoppel is unprecedented, and has no basis, in the context of an IEPC. Contract and promissory estoppel claims are rejected outright, finding no evidence to conclude that the Respondent bound itself either expressly or by a course of conduct to undertake the training. It cannot be concluded that this amounted either to an unqualified promise or to a contract right to the training.

10. An agreement made in the process and progress of an IEPC meeting cannot be construed as a promise. A written IEP is the promise. The proposal that Respondent presented at the IEPC meeting of 3-18-96 was merely that, a proposal. That proposal is neither an agreement nor a contract. Clearly an IEP is not a performance contract that imposes liability on a teacher or public agency if a child with a disability does not meet the IEP objectives. While the agency must provide special education and related services in accordance with the IEP of each child with a disability, the act does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement. (Note 60. Appendix C to 34 CFR Part 300, Note 60).

11. In an issue involving failure to provide FAPE, the Court in Parents of Student W. v Puyallup School District, (21 IDLR 723 (9th Cir. 1994)) held compensatory education to be

an equitable rather than a legal (contractual) remedy, suggesting that an IEP is not a contract. However, the Jeffory Court held that an IEP is a contract between the parents . . . and the school district that indicates the services the school will provide to educate that child. Jeffory S. Coombs v School Bd. of Rockingham County, 1992 WL 245671 (W.D. Va.). FNI. But in this matter, no IEP resulted from the IEPC meeting of 3-18-96.

12. MSER 2le (4) provides for dissent from an IEP, that is a completed IEP. Being that an IEP did not issue from the IEPC meeting of 3-18-96, there was no occasion for anyone to dissent.

13. The requirements for the content of a written, finalized, IEP are set forth in the Act, and in the Michigan and federal rules and regulations. These are amplified in notes in Appendix C to 34 CFR Part 300:

13a. Note 44:

> The IEP must include all of the specific special education and related services needed by the child as determined by the child's current evaluation.

13b. Note 45:

> The IEP must include all services necessary to meet the child's identified needs; and all other services in the IEP must bc provided in order

for the agency to be in compliance with the Act.

13c. Note 47:

The IEP is required to include only those matters concerning the provision of special education and related services and the extent the child can participate in regular education programs.

13d. Note: 48:

If modifications (supplementary aids and services) to the regular education program are necessary to ensure the child's participation in that program, those modifications must be described in the IEP.

13e. Note 51:

The amount of services must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and IEP team members.

13f. Note 52:

The IEP must include a "statement of the extent that the child will be able to participate in regular educational programs."

14. The essential justification for the doctrine of promissory estoppel is the avoidance of substantial hardship or injustice were the promise not to be enforced. Malakar Corp. Estoppel should be applied only where the facts are unquestionable and the wrong to be prevented undoubted. Marrero, at 442. Barber v SMH (US), INC. (202 Mich App 366). The sine qua non of the theory of promissory estoppel is that the promise is clear and definite. State Bank of Standish v Curry (442 Mich 76 at 85).

50. Issue VI. DID THE LHO ERR IN CONCLUDING THAT RESPONDENT WRONGFULLY FAILED TO INVITE PETITIONERS TO STAFF MEETINGS HELD ON 4-16-96 and 4-26-96?

51A. VI.A. DID THE LHO ERR WHEN HE DETERMINED THAT THE 4-16 AND 4-26 MEETINGS WERE IEPC MEETINGS SIMPLY BECAUSE NEW PROPOSALS EMANATED FROM THEM?

51B. VI.B. DID THE LHO ERR IN INVALIDATING THE IEP OF 5-17-96 BECAUSE OF VIOLATIONS REGARDING PARENTAL INVOLVEMENT IN THE IEPC PROCESS?

51c. VI.C. DID THE LHO ERR IN SHIFTING THE BURDEN OF PROOF FROM PETITIONERS TO RESPONDENT?

a. DECISION

1. The LHO erred in concluding that Respondent wrongfully failed to invite Petitioners to Respondent's staff meeting held on 4-16-96. The subject meeting was a staff meeting.

2. The LHO erred in concluding that Respondent wrongfully failed to invite Petitioners to Respondent's staff meeting held on 4-26-96. The subject meeting was a staff meeting.

3. The LHO erred in determining that the meeting of 4-16-96 was an IEPC meeting simply because new proposals emanated from it. (Decision, p31). The subject meeting of 4-16-96 was a staff meeting. New proposals were not considered.

4. The LHO erred in determining that the meeting of 4-26-96 was an IEPC meeting simply because new proposals emanated from it. (Decision, p31). The subject meeting of 4-26-96 was a staff meeting. New proposals were developed for a forthcoming IEPC.

5. The LHO erred in invalidating the IEP of 5-17-96. The ruling set aside.

6. The LHO erred in the shifting burden of proof from Petitioners to Respondent. The ruling is set aside.

[Note: The LHO did not invoke promissory estoppel to either invalidate the IEP, or to shift the burden of proof to Respondent. The revocation and the reassignment of the burden were executed solely in his ruling at Decision 2.3.]

b. Findings of fact

1. Respondent knows and understands the difference between a staff meeting and an IEPC meeting. (See IEPC invitations and memoranda in HO-16, HO-17).

2. The meetings held by Respondent's staff on 4-16-96 and 4-20-96, were not IEPC meetings, they were staff meetings (T-1525, 1763, 1764). The LHO exclaimed that, "Respondent characterized the meetings as "routine" to address "programmatic" issues; however, the LHO cannot ascribe to that characterization, since significant changes materialized / emanated from them ! [sic] (Decision, p 31). The subject meetings were routine staff meetings arranged to address programmatic issues for a proposal for a forthcoming IEPC meeting.

3. The LHO's exhibit, HO-16 dated 4-4-96, is a memorandum from school Principal Goodsman, to selected staff, scheduling a meeting for 4-16-96, the subject of which was noted as "Re: Meeting with Ron Greiner and Marianne Miller re: Lovaas". The meeting of 4-16-96 considered a presentation to the staff concerning DTT methodology, and related issues regarding Lovaas (HO-16; T-1602, 1901-1907). Ms. Marianne Miller was the presenter (T-1700-1701, 1977). A cursory reading, let alone perusal, cannot cause this meeting to be construed as an IEPC meeting.

4. The staff meeting of 4-26-96 was not an IEPC meeting, it was a staff meeting. The LHO put forth the statement that director Greiner's memo (HO-17) "even characterized the April 26th Meeting as the 'Burilovich IEPC Meeting.'" He observed that "One of these meetings [4-26-96] was even referred to as an IEPC" (HO-17). The observation is

meaninglessly true. A perusal of HO-17, a memorandum from director Greiner to staff, the subject of which is "Re: Burilovich IEPC meeting", clearly discloses proper pedagogical and professional activity undertaken by Respondent's staff in order to prepare for the forthcoming scheduled IEPC meeting (See Note 55, 34 CFR Appendix to Part 300, in conclusions of law for this issue). The memorandum (HO- 17, excerpted here) lists the attachments appended to the memorandum, and details the activity to be undertaken at the meeting, as follows:

> 1) a copy of Dr. Meinhold's evaluation;
> 2) a copy of my revision of those into goals and objectives (drafted last March but not disseminated);
> 3) Marianne's research on Lovaas, and effective approaches for students with autism;
> 4) information from WISD's Behavior Management Manual that describes discrete trial from a different perspective than Dr. Meinhold.
>
> . . .
>
> . . . First we will, develop goals and objectives that we think are educationally appropriate for B.J., and reflect practices such as: independence, non aversive behavior management, respect for sensory and communication needs, generalization, functionality, reciprocity of relationships, self monitoring, use of least intrusive prompts, choice, and natural reinforcers. Please review Dr. Meinhold's attached report and my draft of goals and objectives prior to the meeting [on

> 4-26-96] to see if any of the goals are educationally relevant.
>
> Second. we'll develop a daily schedule, with placement full time into kindergarten for the rest of this year and next year and support provided by a paraprofessional."

5. The agenda for the meeting of 4-26-96 (HO-17) addressed the matter of developing goals and objectives for a proposed IEP to be presented for discussion at an IEPC. This could not be construed as an IEPC meeting (as the LHO has done). The staff met to develop their own reconnnendations as to goals and objectives and a potential daily schedule program for BJ (T-1289). In doing so, staff again considered Dr. Meinhold's report (T-1526).

6. The results of the activity were incorporated in director Greiner's letter (P-26; dated 5-6-96), which he had forwarded to Petitioners' legal counsel, for Petitioners' review and comment prior to the IEPC scheduled for 5-17-96. Petitioners did not contact director Greiner to discuss either the revised goals and objectives or the proposed daily schedule format (T-1313). Furthermore, they offered no input and did not participate in any discussion at the IEPC meeting on 5-17-96 (T-1176).

7. The results of the staff meeting of 4-26-96 are of record in the LHO's own exhibits, HO-18 and HO-19: Exhibit HO-18 dated 4-29-96, is a memorandum with 2 attachments, the subject of which is "Re: B.J's Goals and Objectives". One attachment consists of a draft of five goals, each with a

respective annual goal and short term objectives. Assessment procedures, performance criteria, and schedules for evaluation were incomplete in the draft. The second attachment is an incomplete daily kindergarten schedule. . . . "Exhibit HO-19 dated 5-6-96: Memorandum "Re: B.J.'s Revised Goals and Objectives and Daily Schedule. In this memorandum director Greiner the addressees that the above-mentioned matter had been faxed to parent's attorney, and that an IEPC meeting was scheduled for 5-17-96. Greiner then said, "The District will present this proposed program for discussion and decision. . . ." Both, through Mr. Greiner's 5-6-96 letter, and at by means of the meeting on May 17, Petitioners were provided with an opportunity for input into B.J.'s program. The letter of 5-6-96 (P-26) is included in, and a part of, the IEP of 5-17-96 (T-1355, 1430).

8. The LHO ruled that, "Based upon the evidence and testimony, the district would not have carried the burden in convincing the LHO that a DTT approach (as initially proposed by school personnel at the 3-18-96 IEPC) was not appropriate for BJ" (Decision, p 33). "Neither did the testimony and evidence convince the LHO "that other, more appropriate programs were available." (Decision, p 33)

9. The LHO ruled, post-hearing, that one procedural safeguard, erroneously determined, had been violated (Decision on issue 2.3, Decision, p30) and therefore, the reaasigned the burden to Respondent. The reassignment was made, post-hearing, in the LHO's Decision (p30).

c. Conclusions of law

1. Pursuant to Cordrey v Euckert, 917 F2d 1460 (1990) and Doe v Defendant, 898 F2d 1186 (1990), that the party contesting the results of an IEPC must carry the burden of proving that the IEP is the product of defective procedures or substantively inappropriate. Petitioners failed to carry that burden.

2. The meetings held on 4-16 and 4-26, being staff meetings, Petitioners were not invited to, nor did they participate, in them. Contrary to the LHO's conclusion there is no legal requirement for invitations to, or participation at, staff meetings. Neither meeting was an IEPC meeting. Parents need not be invited to staff meetings held to discuss a student, as long as the meetings to which parent are invited afford them full and meaningful participation in the IEP process. Letter to Evans, 17 EHLR 1105 (OSEP 1991).

3. Respondent has exercised the duty to conduct meaningful meetings with Petitioners. This duty was exercised on 12-01-95, 3-18-96, and on 5-17-96, supplemented by telephone conferences and correspondence with Petitioners in the interim periods. Target Range School District, 960 F.2d at 1485.

4. Respondent was within its rights in bringing a proposal for an IEP to the meeting IEPC meeting of 5-17-96. Guidance from Note 55 (Appendix C to 34 CFR Part 300) is applicable here:

> Is it permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the

> parents of 1) the child's need for special education and related services and 2) what services the agency will provide to the child Section 602(a)(20) of that Act defines an IEP as a written statement developed in any meeting with the agency representative, the teacher, the parent, and if appropriate, the child? It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short terms instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. The legislative history of [the Act] makes it clear that parents must be given the opportunity to be active participants in all major decisions affecting the education of the their children with disabilities. . . .

5. Teacher training is not a matter to be addressed in an IEP. Sioux Falls School District v. Koupal, 22 IDELR 26; 256 NW2d 248 (SD S.Ct. 1994).

51. ROWLEY TEST, STEP 2: THE 'EP IN SUBSTANTIVE COMPLIANCE.

Sec. 1401(a)(20) specifies requirements of an IEP:

> The IEP shall include: "(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs. (D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting. (E) the projected date for initiation and anticipated duration of such services and (F) appropriate objective criteria and evaluation procedures and schedules for determine, on at lease an annual basis, whether instructional objectives are being achieved."

Federal and state regulations also describe the required contents of an IEP.

52. Issue VII. DID THE LHO ERR IN FAILING TO FIND THAT THE 5-17-96 IEP PROVIDED A FAPE?

a. DECISION

1. The LHO erred in failing to find that the 5-17-96 IEP provided a FAPE.

2. The LHO erred by failing to consider the requirement that special education programs and services be provided within the LRE.

3. The IEP issuing from the IEPC meeting of 5-17-96 is valid.

b. Findings of fact

With respect to the IEP and FAPE.

1. The challenged IEP (P-29, R-29, and excerpted at pp8-10 of this decision) that emerged from an IEPC held on 5-17-96 contains all requirements set forth in MSER 2le(3) subsections (a) through (i), but excluding subsections (g) and (h) which apply to students aged 12 and 16 years respectively.

2. In testimony, the challenged IEP (P-29, R-29; and excerpted at pp8-10 of this Decision) was further described as follows: The IEP is designed to address BJ's unique needs and to develop his maximum potential, as set forth in Pinto that the IEP "reasonably and continually challenge" BJ to meet his goals and objectives. The kindergarten setting is the LRE for BJ's maximum potential, and also to full access and opportunities for interaction with non-handicapped age peers.

3. Specifically, the challenged IEP of 5-17-96 IEP addresses
Appropriate goals (with high expectations),
Opportunities for generalization throughout the school day,

Motivation,
Flexibility,
Ongoing assessment of BJ's performance,
Peer models,
Functional behaviors in a naturalistic environment,
Socialization opportunities,
Assignment of a 1:1 ratio use of a paraprofessional with training in behavior management, assigned exclusively to BJ (P-29), and working as part of a team with other professionals,
Support elements at every point in the school day,
Support from a TC from Washtenaw ISD for at least 4 sessions weekly.
Support from a staff TC at least once a week,
SLT daily,
OT weekly,
Gradual phase-in and transition up to a full-day regular kindergarten program with the same teacher,
Alternate educational settings, as necessary, for BJ to relocate to another educational setting in the building, even after transition into the full-time kindergarten,
Regular team meetings including the school psychologist and SSW and other special and general education staff members, and the parents if they desire, and
Options for an ESY for BJ at a follow-up IEPC to determine his needs therefor.

4. DTT is not included: it is an alternative methodology that Respondent does not propose, but that Petitioners desire.

5. The educational setting in which the subject IEP would be implemented is a kindergarten, which is in the neighborhood school that BJ would attend were he not handicapped.

6. The elements listed in 3 preceding, would be provided in accordance with a daily schedule system, which is an element of the IEP. In establishing the daily schedule proposal for BJ (P-29), the staff matched each of the goals and objectives with a segment of the kindergarten program at which a respective goal and its respective objectives could best be addressed. The daily schedule method is: Adaptable and flexible, it is open to methodological revision based on team input and on BJ's performance as it provides continuous assessment of student performance. It recognizes that during portions of the school day, it might be necessary for BJ to work in an alternative space, away from the kindergarten class. It provides for adaptations to facilitate BJ's participation. The proposed daily schedule contained in the IEP was not significantly different, in terms of time periods, vis-a-vis the home program (cf P-28, p 99-101 with Dr. Burilovich's testimony at T-624-638). A comparison of schedules follows:

Daily Home Schedule

9:30 - 9:45	Therapist arrives; get dressed
9:45 - 10:45	"Lovaas-style" DTT
10:45 - 10:50	Bathroom
10:50 - 11:15	"Lovaas-style" DTT
11:25 - 12:00	"Lovaas-style" DTT
12:00 - 12:30	Outside Play.
12:30 - 1:30	Lunch; Bathroom
1:30 - 3:00	"Lovaas-style" DTT

Daily School Schedule

8:40 - 9:50	Arrive at school; Free Choice
9:50 - 10:10	Opening; Specials
10:10 - 10:30	Large Group Instruction
10:30 - 11:30	Seat Workl
11:15 - 1 1:25	Play Break
11:30 - 12:25	Free Play; Recess; Lunch
12:25 - 1:30	Arrival; Free Choice
1:30 - 1:50	Opening; Specials Play break
1:50 - 2:10	Large Group Instruction
2:10 - 3:25	Seat Work
3:25	Leave

(T-1200-1201, 1204-1205, 1567-1568, 1573, 1810-1811)

7. Lovaas-style DTT is not included in the challenged IEP. Except for a paraprofessional-to-pupil ratio of 1:1, the IEP bears no semblance of a Lovaas-style DTT package.

8. The IEP provides placement for BJ in a kindergarten, with abundant support, in his home school. In the Malkentzos v DeBuono, (New York) the child was a 3-year-old boy, who had been placed in a program for 0-3 year-old disabled children operated by the NY Department of Health (The NY Department of Education provides for infants and toddlers ages 3-5 years.). The child was placed in a structured play environment routinely used with disabled children [Not a kindergarten in a school]. The Court said, [and the SHRO would agree], that "such placement ignores the special

difficulties of autistic infants and children and can harm their development."

9. The "Lovaas-style" DTT package proposed by Dr. Meinhold and advocated by Petitioners (P-23) is a significantly more restrictive environment than that of Respondent's IEP (P-28). Petitioners' proposed package requires a) a 1:1, 40-hour Lovaas DTT program in a totally restrictive environment with no peer interaction during DTT. It provides minimal contact with peers, and does not provide communication training, opportunities for generalization and socialization, and it fails to provide needed related services of speech and language therapy and occupational therapy.

10. Petitioners' proposal for the Lovaas DTT program, provides for only 5 hours a week, i.e., one hour a day, in a "preschool" environment, with 1:1 behavioral aide support, and 40 hours a week of "Lovaas style" DTT divided between home and school settings. Respondent's proposal, on the other hand, provides the opportunity for B.J. to segue to full-time with his nonhandicapped peers in a regular kindergarten setting, with a trained paraprofessional in a ratio of 1:1, and to the degree that BJ can handle it.

11. The LHO invalidated the 5-17-96 IEP for an erroneously-held procedural violation. He did not find the challenged IEP to be inappropriate or that it failed to provide benefits. He stated only that he found that it was not more appropriate. The LHO ruled, by mere assertion, that the services privately procured by the parents were reasonably calculated to provide educational benefit (Decision, p36).

With respect to BJ's strengths and needs:

12. The LHO summarily found that BJ's needs are: "2. Bradley needs programs and services to meet his identified needs (R 340.1701; R 340.1745; R 340.1749). 3. His identified needs are a matter of record." (Decision, p 37). The LHO did not identify the needs to which he referred.

13. The record does reveal that: B.J. possesses the skills to be successful in a regular kindergarten classroom, with support, that is proposed in the challenged IEP (T-1509, 1567-1568, 1575-1576, 1707, 1731, 1810). BJ would not be too disruptive in a regular kindergarten setting (T-1575-1576). He possesses the necessary skills to benefit from the daily schedule method in a general education kindergarten placement with appropriate support (T-1509, 1567-1568, 1575-1576, 1707, 1731, 1771, 1810, 1981-1983). BJ engages in some imitative behavior if prompted, but if left to play on his own he simply sits down with his current favorite toy, and plays with it inappropriately (T-31, 631).

14. Dr. Holmes testified that as of August 1996, BJ was barely verbal and had a low skill level (T-545). Dr. Burilovich testified that BJ's spontaneous, non-prompted, speech has been limited to saying "mama" once, requesting a cookie once, saying "more" once, and saying "hi" more than once (T-644-645). BJ's communicative speech is virtually nonexistent (T-644-645, 1468, 1473, 1491-92, 1792, 1834). Further, without prompting, BJ does not engage in appropriate play (T-631).

With respect to progress:

15. Dr. Meinhold identified progress in the area of prompted imitation. Progress observed while in the PPI program includes: increase in words produced in the classroom, in comparison to when he was first seen at which time he was nonverbal (T-1469). He responded to simple verbal commands, such as, "sit down", (T-1479). There was a change in his social behavior, he could be engaged longer, had more eye contact, and tolerated other children playing near him for a longer period of time. (T-1470-1471).

16. A review of B.J.'s progress from December of 1993 through August 1996, during which he received significant levels of DTT, supports the testimonial opinions that a "Lovaas-style" DTT program package would not appropriately address BJ's needs. SSW Senunas concluded that B.J. had not made much progress for having received 30 hours a week of DTT (T-1839-40, 1848, 1849). In January 1996, she observed some eye contact, a very short attention span, and no use of words with her, BJ made approximations of certain words when prompted by Dr. Burilovich (T-1789, 1792, 1834). Dr. Mesibov, who reviewed B.J.'s MET reports, Dr. Tsai's report, Dr. Meinhold's report, and viewed the two parent-produced video tapes (parent 49 and 50) also testified that BJ had not made any significant or meaningful progress between December 1993 and August 1996 (T-899, 944-945, 947).

With respect to extended school year (ESY) for B J:

17. Dr. Meinhold acknowledged that regression would typically be recouped following a resumption of services for the same length of time as the period during which there were no services (T-399). No empirical data concerning the regression issue was presented by either Dr. Meinhold or Dr. Holmes. No testimony was provided that breaks in services would seriously impede BJs progress toward his educational goals. Respondent acknowledged in the IEP that an ESY might be necessary for BJ (P-28, p 92).

With respect to maximum potential.

18. Dr. Holmes opined that the point at which conducting DTT is no longer useful, is "when the person is indistinguishable from everybody else" (T-554). In practice, this goal would test the limits of Nelson, Barwacz, and Rowley. "FAPE means provision of a basic floor of opportunity -- rather than provision of instruction and services sufficient to erase any disparity between achievement and potential resulting from a child's handicap."

19. The LHO assumed both programs were directed toward BJ maximum potential (T-1775).

c. Conclusions of law

1. Respondent has developed a procedurally correct IEP, that provides a FAPE, and that has the potential to provide an educational benefit in the least restrictive environment for the development of BJ's maximum potential. (The test of the

appropriateness of a proposed public placement for a student who previously had been attending a private school as a result of a unilateral placement is not whether the private school's program has benefitted the student in the past and will likely continue to do so in the future, but whether the proposed placement has the potential to provide the student with an educational benefit. Lewis v School Br., 19 IDELR 712 (E.D. Va. 1992)).

2. FAPE is satisfied when the State provides personalized instruction with sufficient support services to permit a handicapped child to benefit educationally from that instruction. Such instruction must "(1) be provided at public expense; (2) meet the State's educational standards; (3) approximate grade levels used in the State's regular education system; and (4) comport with the child's IEP, formulated in accordance with the requirements of the Act." It means provision of a basic floor of opportunity - rather than provision of instruction and services sufficient to erase any disparity between achievement and potential resulting from a child's handicap. (Board of Education v Rowley, 458 US 176, 102 S Ct 3034, 73 LEd 2d 690 (1982)). Respondent provides a FAPE within these prescriptions.

.3. Rowlev provides the standards for determining the validity and appropriateness of an IEP in a 2-part test. The first step is used to determine whether Respondent has complied with the procedural requirements of IDEA. In this matter, the test was applied by the LHO, who found one procedural violation for which he invalidated the challenged IEP. The SHRO upon review found that the LHO had erred, and set aside the LHO's ruling. The challenged IEP is procedurally valid.

The 2nd step of the Rowley test seeks to determine whether the IEP is reasonably calculated to enable the subject to receive educational benefits. This step examines the appropriateness of the IEP, defined at § 300.340 as:

> A written statement for a handicapped child that is developed and implemented in accordance 34 CFR §§ 300.341-300.348. Section 300.346 requires that the following elements be included in an IEP: (a) A statement of the child's present levels of educational performance: (b) A statement of annual goals, including short term objectives: (c) a statement of the specific special education and related services to be provided to the child. and the extent to which the child will be able to participate in regular educational programs; (d) The projected dates for initiation of services and the anticipated duration of the services; and (e) Appropriate objective criteria and evaluation procedures for determining, on at least an annual basis, whether the short-term instructional objectives are being achieved.

These requirements, adopted in MSER s at 2le(3) are:

> R 340.172le Individualized educational planning committee meeting: determination of eligibility for special education programs and services; individualized education program.

Rule 2le(1) The superintendent shall convene an individualized educational planning committee meeting.

(2) The participants shall determine if the student is eligible for special education programs or services, or both. Eligibility shall be determined by the committee after receipt and review of the multidisclplinary team report and recommendation, and after consideration or any additional information presented by the participants. If a student is determined to be disabled, the committee shall write an individualized education program or may reconvene for this purpose. In either event, the time line specified in R 340.1721e(2) shall apply.

(3) An individualized education program shall be based on all diagnostic, medical, and other evaluative information requested by the committee or provided by the parent or person who is disabled and shall include all of the following information, in writing:

(a) A statement of the person's present level of educational performance.

(b) A statement of annual goals, including short-term instructional objectives.

(c) Appropriate objective criteria and evaluation procedures and schedules for determining whether the instructional objectives are being achieved.

(d) The extent to which the person is able to participate in regular education programs

(e) An identification of the least restrictive environmental program and related service options which were considered, including the reasons why the options were accepted or rejected in making the decision or decisions required in subdivision (f) of this subrule.

(f) A statement of the specific special education or ancillary and other related services, or both, to be provided to the person, giving consideration to the accessibility of physical facilities; transportation, including the need, if any, for aids or restraints; and room and board.

(g) Beginning at page 12, a statement indicating committee consideration of prevocational / vocational education needs.

(h) Beginning not later than age 16, or a younger age if determined appropriate, a statement of the needed transition services as defined in R 340.1701b(j), including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting, if the individualized educational planning committee determines that services are not needed in 1 or more of the areas specified in R 340.1701b(j), the individualized education program shall include a statement to that effect, and the basis upon which the determination was made.

(i) The projected dates for initiation of special education programs and services and the

> anticipated duration of the programs and services.
>
> (4) Any participant in the committee's deliberations who disagrees, in whole or in part with the committee's determination may indicate the reasons therefore on the committee's individualized education program report or may submit a written statement to be attached to the report.

4. Respondent fulfills the requirements of the second part of the Rowley test, and therefore, the challenged IEP is both valid and appropriate, and includes the maximum potential and LRE standards. Methodology is left to Respondent.

5. Petitioners unilaterally and voluntarily withdrew their child from the PPI program provided FAPE by the LCSD c.11-29-95. Subsequently, three IEPCs were held, an IEE was undertaken, a due process hearing of nine days duration was decided at the local level, and state level appeals were made. The stay-put IEP of 11-05-94, signed and agreed to by Petitioners' provided FAPE. Burlington informs that: If a student has a FAPE and the parents choose to place their child in a private school or facility, the agency is not required to pay for the child's education at the private school or facility, [or, as in this matter, at a home program]. If a parent contends being forced, at own expense, to seek private schooling for the child because an appropriate program does not exist within the LEA, and, if the LEA disagrees, that disagreement and the question of who remains responsible is a matter to which the due process procedures apply. Burlington Sch. Comm. v Department of Educ., 1984-85

EHLR 556:389 (U.S. 1985). Petitioners unilaterally and voluntarily withdrew BJ, and a due process hearing was held.

6. MSER 22 (2) provides that it is a district's responsibility

> 1) to assure that to the maximum extent appropriate, a person with disabilities must be educated with persons who do not have disabilities, 2) that the removal of a person with disabilities from the regular education environment may occur only when the nature and/or the severity of the disability is such that education in a regular class using supplementary aides and service cannot be satisfactorily achieved, and 3) that in selecting the LRE, consideration must be given to any potentially harmful effects to the student or the quality of services that the student needs.

7. The LRE standard in Michgan is that schools shall to the maximum extent appropriate, provide special education programs for the services that are designed to develop the maximum potential of each handicapped person within the least restrictive environment. Barwacz v Michigan Department of Education 681 F. Supp. 427 (W) (D) Mich. (1988), at 433.

8. Courts have rejected programs and placements proposed by parents on the ground that they involve settings which are too restrictive. Kerkam v Superintendent, 931 F2d 84 (D.C. Cir. 1991) and G. D. v Westmoreland School District, 930 F2d 942 (lst Cir. 1991). Respondent's program is a

maximum LRE in terms of setting and in terms of access to nonhandicapped age peers.

9. Nelson v Southfield Public Schools, (148 Mich App 389 (1986)), recognized that federal law requires the State to develop a plan assuring all handicapped children the right to a FAPE, which means services that meet the standards of the State. In recognizing that Michigan law does not define the phrase "maximum potential", the Nelson court stated: "[T]here is some limitation on what kind of program is required. When two competing educational programs which meet the child's requirements are evaluated, the needs of the handicapped child should be balanced with the needs of the state to allocate scarce funds among as many handicapped children as possible." at 393.

10. The Barwacz court found that Michigan clearly indicated that there are limits to the requirement that handicapped children must be educated to their maximum potential, and recognized that Michigan courts have made it clear that "maximum potential" is in some sense only precatory in that it does not mean utopia, nor does it apparently mean the best education conceivable. Barwacz v Michigan Dept. of Educ, et al., 681 F. Supp. 427 (W.D. Mich 1988).

11. In Kalamazoo City Public Schools and Kalamazoo Valley ISD, 2 ECLPR 18() (SEA MI, 1996), the LHO in that matter, noted that while "maximum potential" is the appropriate standard for evaluating a student's IEP under Michigan law, it is impossible to determine anyone's maximum potential. Accordingly, the LHO adopted a practical approach in determining whether a program is designed to develop a

student's maximum potential: Does the program and services set forth in the IEP "reasonably and continually challenge" the student to meet his or her goals and objectives."

12. Alamo Heights v State Board of Education, 790 F2d 1153 (5th Cir. 1986) established the basic standard for deciding when an ESY is required. A continuous program is required if the child "would suffer at least substantial regression without continuous, structured programming." Id. at 1159. Cordrey v Euckert, 917 F2d 1460 (6th Cir. 1990) contains an analysis of ESY cases. It concludes that the issue is whether the student would, without an ESY, suffer "significant skill losses of such a degree and duration so as seriously to impede his progress toward his educational goals." Id. at 1274. Where there was no clear empirical data and where the testimony was "directly conflicting" the district court's conclusion that an ESY was not required was affirmed. Id. at 1475. In this matter, no clear empirical data arose, and were conflicting.

53. Issue VIII. DID THE LHO ERR IN FINDING THAT RESPONDENT WAS REQUIRED TO CONVINCE THE LHO THÁT A DTT APPROACH (AS INITIALLY PROPOSED BY RESPONDENT ON 3-18-96) WAS NOT APPROPRIATE?

a. DECISION

1. The LHO erred in requiring Respondent to convince the LHO that a DTT approach was not appropriate.

2. DTT is not a requirement in an IEP. DTT is a methodology.

3. Being that the IEP is valid, i.e., meeting both parts of the Rowley test, methodology to implement the valid IEP is at the discretion of Respondent.

b. Findings of fact

1. Petitioners proposed a specific methodology to develop BJ'S FAPE, viz., a Lovaas style DTT package. Respondent's proposal is entirely antipodal, and clearly competitive. The choice of methodology is not justiciable in this matter. Respondent determines the methodology to be used in the implementation of BJ's IEP.

2. The LHO said, "There is no indication how much (if any) consideration was given to the DTT program BJ was receiving at home." (Decision, p 31). Sans detail, and except for his erroneously derived finding of one procedural violation that resulted in invalidation of the IEP, the LHO observed that the District "would not have carried the burden of proving that DTT was not appropriate for B.J." (Decision, p31). Respondent is not required to do so (See Lewis). Evidence that a child made good progress in a private placement is not determinative of whether a public school placement offered a FAPE. Fuhrman v East Hanover Board of Educ, 993 F2d 1031 (3rd Cir. 1993).

3. Respondent's challenged IEP does not contain DTT or any other aspect of Lovaas-style methodology, with the exception of a paraprofessional-to-pupil ratio of 1:1.

4. The LHO reassigned (erroneously) post-hearing, the burden of proof to Respondent.

5. Dr. Meinhold recommended the "Lovaas-style package" because it is what is most feasible in a full-time program (T-385, 408), and because she knew of no studies other than Lovaas' which support particular programs. Dr. Mesibov, however, testified that there are several approaches that produce promising results with autistic individuals, and those approaches have clinical outcome-based study support (T-893,896, 944-945, 947).

6. With respect to the 40-hour Lovaas requirement: Petitioners have consistently demanded a 40-hour, "Lovaas-style" DTT program, which they maintain is equivalent of a Lovaas package (T-1984) (T-467). Only Petitioners' and their consultants, Drs. Meinhold and Holmes, support that program for BJ. Dr. Holmes also testified that the Autism Society of Michigan does not promote Lovaas-type training. (T-553). Forty hours in a 5-day week means an 8-hour daily regimen of DTT for 6-year-old BJ.

7. The testimony in this hearing gave rise to two paradoxes underlying Lovaas-style DTT programming: 1) Lovaas-style programming requires 40 a week of DTT, provided 1:1 by young, usually college-age trainers. Dr. Holmes testified (with concurrence from the LHO) that, "Trainers 10 hrs/week -- burn out with more than 10 hours per week of DTT. Their tolerance is 10 hours" (T-579) and the LHO concurred (T-720). Paradoxically, Ms. Dorenkamp observed that Petitioners' proposed 40-hour program is too intense for a child of that age (T-2005). If 10 hours a week "burn out"

college-aged trainers, what, one must ask, is the effect on a child of six? Dr. Holmes said he thought it [40 hours] has to do with the 40-hour work week, "where that figure comes from." (T-549). It must therefore be concluded, that, in accordance with Dr. Holmes personnel considerations, a 40-hour a week program would appear to require four individual trainers, i.e., one for every 10 hours of 1:1 DTT "at the table."

8. Lovaas-style programming requires continuous recording of the child's responses, i.e., of each trial. Here, a second paradox arose. Dr. Burilovich testified (T-616) that "one of the therapists was spending too much time writing than interacting." The question here, is whether one trainer can do both, or are two trainers needed to administer a DTT program: one to conduct trials and the other to record them?

9. Apropos in this context, and from the colloquy between the LHO and the attorneys (T-1896), is a consideration of the definition of a program per Lovaas. The SHRO found reference to "DTT", "Lovaas-style DTT", "Lovaas style DTT package", "Lovaas DTT", and finally the program as Lovaas reported it in 1987, which includes aversives, i.e., punishment.

c. Conclusions of law

1. The LHO did not rule on the FAPE provided in the challenged IEP. Neither did he rule on methodology although he raised the question during the hearing upon recognizing DTT as a "particular methodology." (T- 1896).

2. While parents' views as to an appropriate methodology must be considered by a school district, the law is clear that a parents do not have a right under the IDEA to compel a school district to adopt a specific method in providing for the education of their child with a disability. The choice of methodology, is not a justiciable issue in this matter, the IEP is procedurally valid and it provides FAPE.

3. MSER 2ld: Responsibilities of the IEPC .... [The] IEP shall not determine how the programs and service shall be delivered, except where such is an integral part of the placement or service itself.

4. Rowley, (458 U.S. 176, 208 (1982)) notes that: The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. In the present matter, the parties hold polarized positions as to the methodology most suitable to BJ's needs. See and: Board of Educ. of the Greenwood Lake Union Free Sch. Dist., 23 IDELR 1032 (1996). The law is clear that parents do not have a right under the IDEA to compel a school district to adopt a specific method in providing for the education of their child. Lachman v Illinois State Board of Education, 852 72d 290 (7th Cir. 1988). The holding that methodology is left to the school district to choose has been applied by courts and hearing officers in disputes about Lovaas style DTT. Barnett v Fairfax County School Bd., 927 F2d 146 (4th Cir. 1991); Tuscaloosa County Bd. of Educ., 21 IDELR 826, 830; Grapevine - Colleyville Indet. Sch. Dist., 21 IDELR 875,

877; Brandywine Sch. Dist., 21 IDELR 1013, 1018; Chester County Interm. Unit, 23 IDELR 723, 724; Gregory K. v Longview School Dist., 811 F2d 1307, 1314 (9th Cir. 1987); Fairfax County Public School., 22 IDELR 80 (1995); Downers Grove Grade School Dist. No. 58, 23 IDELR. 36 (N.D. Ill, 1995). Letter to Hall, 21 IDELR 58 (OSERS, 1994);

F. FINDINGS OF FACT

54. After considering all of the evidence on the record, though only small portions of it are cited here, as well as the parties' briefs, and the preceding statements of facts incorporated here by reference, the SHRO finds as follows:

a. On review of the record, the SHRO is satisfied that petitioners received all of the process that was due to them.

b. The SHRO affirms the LHO's ruling on the influence of the Ann Arbor Public Schools matter on the actions in the instant case. The LHO wrote: "As a consequence of the LHO's [unspecified] rulings, these events are moot and need not be addressed." (Decision, p 33).

c. The IEP provides for full inclusion in a regular program, with supportive services, (SLT, OT, 1:1 Paraprofessional, ISD TC consultation, Staff TC consultation, both providing oversight, spatial flexibility, temporal flexibility, observation, team planning, and parental involvement). In addition, the site of the inclusion program is in BJ's own neighborhood school. Annual goals and short term objectives in the disputed IEP address BJ's unique needs. His unique needs,

in addition to those listed elsewhere in this Decision, are as follows: improvement of social skills and socialization, communication and expressive language skills, imitation for placement and positioning of himself and of objects during naturally occurring classroom activities, with decreasing prompts and cues. Receptive language, demonstrated by consistently pointing to objects when identified by an adult, and demonstrating an understanding of the names of 20 objects found in the school and home environment, presented in an array of up to five. Expressive language: using of yes and no and labels for objects, using words to express his wants and needs. Self care skills sufficient to improve his ability to dress independently, and to toilet independently, in school, with decreasing prompts and cues. Building prosocial skills by engaging in non-social vocalizations, isolated play, and sensory seeking behaviors and socially appropriate sensory behaviors, engaging in parallel play and in turn-taking.

d. The IEP of 5-17-96 provides FAPE to the maximum potential in the least restrictive environment.

e. BJ needs the access by transition to the full-day kindergarten program and daily schedule option, to meet his identified unique needs.

f. BJ needs the related services of speech and language therapy and occupational therapy provided in the IEP of 5-17-96

G. CONCLUSIONS OF LAW

55. Based upon the fundings of fact by reference, the arguments of counsel, as well as the SHRO's own legal research, the conclusions of law are as follows:

a. Bradley Burilovich is handicapped as defined under R 340.1702 and R 340.1715 and he is eligible for special education progams and services.

b. Neither procedural violations in the development of the disputed IEP, nor substantive violations in the IEPC process and the ensuing IEP of 5-17-96 obtain.

c. The 5-17-96 IEP for B.J. Burilovich provided a FAPE designed to permit B.J. to achieve his maximum potential in the LRE. FAPE was here designed to maximize BJ's potential by reasonably and continually challenging him to meet his agreed upon goals and objectives.

d. The requirements of Rowley are satisfied, as are the requirements of Roncker, Burlington, and Barwacz, and Nelson.

e. The IEP of 5-17-96 provides a FAPE for the unique needs of Bradley Burilovich.

f. Petitioners have failed to meet their burden of proving that appellant-respondent's IEP, which they challenged, is procedurally in violation, and that Respondent has not provided a FAPE for BJ under the IDEA and Michigan. Respondent does not have the burden of proof, which the LHO had improperly reassigned to Respondent, based on error.

H. ORDER

56. It is therefore ordered that:

a. The IEP of 5-17-96, the challenged IEP, is valid, in force, and is to be implemented by Respondent.

b. The LHO's "Directive", set forth in Section IV A, B, and C (Decision, pp34-36) is set aside.

c. Reimbursement is denied.

d. This Decision and Order shall be in effect for one calendar year beginning as of the date hereon.

FINALITY: This Decision is final unless it is appealed. Pursuant to R 340.1725a any party aggrieved by this Decision has a right to bring civil action in any court of competent jurisdiction.

/s/_____ Date: 14 March 1997
William P. Sosnowsky
State Hearing Review Officer

ATTACHMENT A

EXHIBITS: "Mutual", Petitioners, Respondent, LHO, SHRO.

"MUTUAL" EXHIBITS

Petitioners exhibit	Respondent' Exhibit	DESCRIPTION
P-01	R-2	MET Rpt 12-10-93
P-02	R-4	IEP 12-17-93
P-03	R-15	U of M Evaluation Rpt.3-23-94
P-06	R-6	IEP 10-5-94
P-07	R-8	Corresp 10-26-95 Gr to B re delay & meeting w/Mcmillan
P-08	R-9	IECP Invitation 10-26-95
P-o9	R-10	Corresp November 13, 1995 B to GR re unable to attend 11-10 meet - behav mod - advocate - meet 12-1
P-12	R-11	Corresp December 7, 1995 Gr to B re synopsis - programming
P-13	R-12	Corresp 12-28-95 L to Gr to re IEE
P-14	R- 13	Corresp 1-12-95 Gr to L re lEE; includes parent handbook
P-15	R- 14	Corresp 1-18-96 Gr to L re IEE
P-16	R-16	Memo 1-24-96 Gr to Mcmillan
P-I7	R-18	Fax, February 6, 1996 M IEP G/Os
P-18	R-17	MET Report, February 9, 1996

P-19	R-19	Corresp 3-6-94 Gr to L re proposal w/safeguards & w/ invitation
P-20	R-20	IEPC Invitation 3-11-96
P-21	R-21	Corresp 3-11-96 Gr to M synopsis
P-22	R-22	Corresp 3-14-96 L to G re corresp w/M
P-23	R-23	Psych Evaluation Rpt by M 3-14-96
P-24	R-24	Corresp 4-16-96 L to Gr re IEP - followthru
P-25	R-25	Corresp 4-22-06 L to Gr re IEPC and IEP
P-26	R-26	Corresp 5-16-96 Gr to L re G/Os - ESY - team meets w parents - included in P-28, P-29
P-27	R-27	IEPC Invitation, May 7, 1996
P-28	R-28	IEP, 5-17-96 (as accepted by Respondent)
P-29	R-29	IEP 5-17-96 (signed in disagreement by Petitioners)
P-33	R-31	Schopler, Short & Mesibov, 57 Journal of Consulting and Clinical Psych 162 (1989)

PETITIONERS' EXHIBITS

EXH	DESCRIPTION
P-04	Corres 6-6-94 B to yomtoob in willowrun
P-05	Corresp 6-16-96 Wixson to B

P-10	Corresp November 29, 1995 Gr to B videotaping
P-11	Petitioners' list of proposals submitted at 12-1-95 IEPC
P-31	Summary of progress: competed by Petitioners c. 8-96
P-32	Lovaas, 55 Journal of Consulting and Clinical Psychology 3 (1997).
P-34	Lovaas, Smith & McEachin, 57 Journal of Consulting and Clinical Psych 165 (1989).
P-46	Committee on "Lovaas Style" Intervention, Rpt. August 1996
P-47	Curriculum Vitae, Patricia Marie Meinhold
P-48	Resume, Peter A. Holmes
P-49	Videotape of Home Program Sessions
P-50	Videotape of School Observation - 11-28-95
P-51	Audiotape of 3-18-96 IEPC (original in custody of Respondent).

RESPONDENT'S EXHIBITS

EXH	DESCRIPTION
R-1	Special Ed. Referral Parent Permission to Evaluate Form, 10-29-xx.
R-3	Corresp 12-10-93 EMU sp/hear clinic re release of info
R-5	Sp Ed. Referral, Parental Permission to Evaluate 9-27-94.
R-7	IEPC Invitation, October 25, 1995.

R-24	Corresp L to Gr, with 95 pp list of parents expenses for home prog
R-32	Model Elementary School map
R-33	Blank Observation Form

LOCAL HEARING OFFICER EXHIBITS

LHO EXH	DESCRIPTION
HO-la	LHO appointment ltr dtd 6-27-96,
HO-1	Corresp to the parties dted 7/15/96
HO-2	Scheduling corresp dtd 7-17-96
HO- 3	Corresp, Eshelbach to Landau requesting home observation and videotaping dtd 3116/96.
HO- 4	Corresp. Eschelbach to Landau again requesting home observation and videotaping dated 8-22-96
HO-5	Corresp, Eschelbach to LHO containing protocol sequence and dated 8-25-96.
HO-6	Corresp, Eschelbach to LHO requesting a directive to allow home observation and videotaping dated 8-30-96.
HO-7	Corresp. Landau to LHO responding to requests for observation and videotaping dated 9-3-96.
HO-8	Corresp. Eshelbach to Landau list of school witnesses and copies of district exhibits dated 9/4/96.
HO-9	Brief by Eshelbach requesting observations dtd 9-18-96.
HO-10	Brief, Landau's opposition of observations dtd 9/11/96
HO-11	Photocopy of miscellaneous record notations re BJ
HO-12	Teacher's Questionnaires, Luke Y. Tsai, M.D.

HO-13	UM Med Ctr from Developmental Disorders Clinic, (check list)
HO-14	Greiner memo to selected staff and Mr. Eshelbach dated 3/11/96 with attachment.
HO-15	Griener memo to selected staff re 3-19-96 IEPC meet
HO-16	Goodsman memo to staff dated 4-4-96.
HO-I 7	Griener memo to staff dtd 4/16/96 regarding BJ IEPC
HO-18	Griener memo to staff regarding Goals and Objectives (4-29-96).
HO-19	Griener memo to staff re revised goals and objectives.
HO-20	Memo from Greiner to selected staff regarding "Update: Lovaas Due Process Hearing" (dtd 8/16/96)

STATE HEARING REVIEW OFFICER EXHIBITS

SHRO EXH	DATE	DESCRIPTION
01	11-22-96	P re intent to file appeal - SHRO 12-13-96
02	11-28-96	R statement of appeal
03	12-03-96	Nester to parties acknowledged appeals
04	12-03-96	Nester to Gottwald the Dec appealed
05	12-13-96	L appeal statement
06	01-16-97	Nester to parties re SHRO appointment

07	01-24-97	SHRO order to E
08	01-24-97	L re disclosure & request for recusal
09	01-27-97	SHRO Affidavit re impartiality
10	01-29-97	L re order to R and briefing
10A	01-29-97	Test fax from DG
11	01-29-97	SHRO list of missing items
11A	01-30-97	SHRO missing items - revised II
11B	01-30-97	SHRO Record inventory
12	01-29-97	SHRO re waiver proposed by L
13	01-30-97	E confirms msg - non-receipt of SHRO of 01-24-97
14	01-30-97	E declines waiver - missing items - challenges SHRO order
15	01-30-97	waiver declined by R - order withdrawn - briefing

APPENDIX B -- CHRONOLOGY

PRE-HEARING EVENTS: 11-15-90 through c. 9-18-96

DATE	EVENT	EXHIBIT #
1990	1990	1990
11-15-90	Birthdate	****
1991	1991 No entries	1991
1992	1992 No entries	1992
1993	1993	1993
1993	SY 1993-1994 PPI program in a consortium: Op'd by willow Run	

	with LCSD	
10-29-93	Sp Ed referral parent permission to evaluate	R-1
12-10-93	Corresp EMU Sp/Hear Clinic request for info	R-3
12-1993	Parents begin DTT at home for 1 hr/day	
12-10-93	MET Rpt	P-01, R-2
12-17-93	IEPC meeting / IEP Willow Run infant-toddler program, 2 hrs/week	P-02 R-4
1994	1994	1994
2-24-96	Evaluation at U of M by Dr. Tsai	
3-25-94	UM evaluation report - Autism	P-03 R-15
5-1994	Petitioners hire BJ's tchr. S. Bayer for home activ.	
6-6-94	Corresp B to yomtoob in willow-run	P-04
6-16-94	Corresp Wixson to B	
Sum. 1994	Trainers begin to administer DTT to BJ in addition to parents	
Fall, 1994	Petitioners do not send BJ to infant toddler program	
9-1994	BJ began PPI prog in LCSD 4 days/week 2.5 hrs/day	
9-17-94	Sp Ed referral, parental permission to evaluate	R-5
10-1-94	Meinhold visits home	
10-5-94	IEP - transition; PPI, 2.5 hrs/day, 4 days/week - THE STAY-PUT IEP	P-0_, R-6
11-1994	BJ receiving DTT 20 hours/week	

post IEP	B McMillan offers DTT in AM before start of sch	
12-1994	DTT at 20 hrs/week	
1995	1995	1995
1-1995	Petitioners reduce time in PPI to 2 days/week from 4	
End SY 95	DTT 25-30 hours/week	
7-1995		
7-1-95	Griener becomes SE director for LCSD	
Sum 1995	BJ enrolled in day care center with tutor	
9-1995	Petitioner's reduce BJ's program to one day/week for 2.5 hrs session; DTT continued	
10-26-95	Invitation to IEPC	P-08 R-9
Oct 1995	Parents required delay of IEPC meeting	
10-26-95	Corresp Gr to B re delay & meeting w/ Mcmillan	P-07 R-8
11-13-95	Corresp B to Gr re unable to Attend 11-10 meet - behav mod - advocate - meet 12-1	P-09 R-10
11-28-95	Videotape of School Observation	P-10
11-1995	Voluntary / unilateral withdrawal of BJ from school	
12-1-95	IEPC meeting; Petitioners list of demands submitted; adjourned inconclusive	P-11
12-7-95	Corresp Gr to parents re synopsis - program elements; seeks to gain	P-12 R-11

	permission to contact Drs. Tsai and Meinhold	
12-28-95 Rec'd 1-8-96	Corresp L to Gr - refusal of program elements of 12-7; IEE requested	P-13 R-12
1996	1996	1996
1-12-96	Corresp Gr to L re IEE	P-14, R-13
1-18-96	Corresp Gr to L re IEE	P-15, R-14
1-23-95	L faxed UM evaluation to Griener; L gives GR permission to contact Meinhold	
1-23-95	Meinhold appears unannounced at Early Elem Sch. and meets with Gr.	
1-24-96	Memo Gr to Mcmillan & Staff / re evaluate BJ	P-16, R-16
1-31-96	Griener, Sanuans, Lupini, make home obs for eval	
2-2-96	Petitioners contact M to complete the IEE	
2-6-96	Fax, Mienhold LEP G/Os	P-17, R-18
2-9-96	MET Report	P-18, R-17
2-12-96	Meinhold faxed draft of G/Os	
c.2-12-96	Mienhold /Griener confer several times	

3-1-96	Greiner memo to selected staff and Mr. Eschelbach with attachment	HO-14
	Griener memo to selected staff re 3-19-96 IEPC meet	HO-15
3-6-96	Corresp. Gr to L re proposal w/ safeguards & w/ invitation	P-19, R-19
3-11-96	IEPC Invitation	P-20, R-20
3-11-96	Corresp Gr to M synopsis	P-21, R-21
3-14-96	Corresp L to Gr re corresp w/ M consent withdrawn for contact w/ Meinhold; L requires that all further contacts with parents require L's permission	P-22, R-22
3-14-96	Psych Evaluation Rpt by M (fax dtd 3-15)	P-23 R-23
3-15-96	Griener meets with staff prior to IEPC meeting	
3-15-96	IECP meeting - no IEP formulated	
3-15-96	Audiotape of IEPC (original in custody of Respondent)	P-51
3-19-96	Staff meeting re IEPC meet	
4-4-96	Goodsman memo to staff	HO-16
4-16-96	Griener to staff regarding BJ IEPC	HO-17
4-16-96	L contacted G re IEP	P-15
4-22-96	Corresp L to Gr re IEP followthru	P-24, R-24
4-22-96	Corresp L to Gr re IEPC	P-25,

	and IEP	P-25
4-29-96	Griener memo to staff regarding Goals and Objectives	HO-18
5-6-96	Griener memo to staff re goals and objectives	HO-19, P-26
5-6-96	Corres Gr to L re G/Os - ESY team meets w parents	P-26, R-26
5-7-96	IEPC invitation	P-27, R-27
5-17-96	IEPC, disputed IEP	P-28, R-28
5-23-96	IEP signed in disagreement / Hearing requested	P-29, R-29
5-25-96	Corresp Gr to L re request for hearing & appt of HO	P-30, R-30
6-27-96	HO-1a LHO appointment ltr	HO-1A
July 1996	Griener leaves LCSD, returns to WISD	
7-15-96	Corresp to the parties	HO-1
7-15-96	Pre-hearing conference	
7-17-96	Corresp re scheduling	HO-2
8-1-96	Memo from Griener to selected staff regarding "Update: Lovaas Due Process Hearing"	HO-20
c. 8-96	Summary of progress completed by Petitioners	P-31
8-11-96	Corresp, Eschelbach to Landau requesting home observation and videotaping	HO-3
8-22-96	Corresp, Eschelbach to Landau again requesting home observation and videotaping	HO-4

8-23-96	Corresp, Eschelbach to LHO containing protocol sequence	HO-5
8-30-96	Corresp. Eschelbach to LHO requesting a directive to allow home observation and videotaping	HO-6
9-1-96	Brief, Landau's opposition of observations	HO-10
9-3-96	Corresp, Landau to LHO responding to requests for observation and videotaping	HO-7
9-4-96	Corresp, Eschelbach to Landau list of school witnesses and copies of district exhibits	HO-8
9-12-96	Brief by Eschelbach requesting observations	HO-9
c.9-18-96	Videotape of home program sessions	P-19

HEARING and related events: 9-9-96 through 10-31-96.

DATE	EVENT	WITNESS HEARD	TR pp #
09-09-96	1st hearing session	Burliovich	0001-0231
09-10-96	2nd session	Meinhold, Burliovich	0235-0448
09-12-96	3rd session	Holmes, Burliovich	0449-0645
09-13-96	4th session	Burliovich,	0646-0835

		Griener	
09-16-96	5th session	Griener, Mesibov, Griener	0836-1104
09-17-96	6th session	Griener	1105-1338
09-15-96	7th session	Griener, Nichols	1339-1535
09-25-96	8th session	Nichols, Stamps	1536-1776
10-01-96	9th (last) session	Sanunas, Miller, Burliovich, Miller, Dorenkamp	1777-2034
10-29-96	LHO decision rendered		
10-31-96	Received at MDE		

C. POST-HEARING and POST-APPEAL EVENTS

DATE	SHRO EXH #	DESCRIPTION
11-22-96	01	P re intent to file appeal
11-28-96	02	R statement of appeal
12-03-96	03	Nester to parties acknowledged appeals
12-03-96	04	Nester to Gottwald appeal of Decision
1997	1997	1997
12-13-96	05	P appeal statement
01-16-97	06	Nester to parties re SHRO appointment
01-22-97		Partial hearing record received for review
01-24-97	07	SHRO order to R

01-24-97	08	P re disclosure & request for recusal
01-27-97	09	SHRO Affidavit impartiality 1st request for missing records Receipt of briefs
01-29-97	10	P re order to R and briefing
01-29-97	11	SHRO list of missing items;
	11A	SHRO missing items - received list
	11B	SHRO Record inventory
01-29-97	12	SHRO re waiver proposed by P
01-30-97	13	R confirms msg non receipt of SHRO of 01-24-97
01-30-97	14	R declines waiver - missing items - challenges SHRO order
01-30-97	15	Waiver declined by R - order withdrawn - briefing
02-08-97	**	Brief on appeal - Petitioners
02-11-97	**	Brief on appeal - Respondent
02-15-97	**	Received list of the exhibits exhibits - P-49, 50, 51

APPENDIX E

Bradley Burilovich

vs. the

Lincoln Consolidated Schools

A DECISION REGARDING THE HEARING AT
THE ADMINISTRATIVE OFFICES
OF THE
WASHTENAW COUNTY INTERMEDIATE
SCHOOL DISTRICT

ON

SEPTEMBER 9, 10, 12. 13, 16, 17, 18, 25
AND OCTOBER 1, 1996

HENRY L. GOTTWALD

HEARING OFFICER

State of Michigan
Board of Education
of the
Lincoln Consolidated Schools

EDWARD AND LINDA BURILOVICH
on behalf of their son
BRADLEY BURILOVICH,

-Petitioner,

vs.

BOARD OF EDUCATION
OF THE
LINCOLN CONSOLIDATED SCHOOLS,

-Respondents.

Dated October 29, 1996

Decision By:
Henry L. Gottwald

INTRODUCTION:

Pursuant to the provisions of Rules 340.1721 through 340.1725 of the Michigan Special Education code, as revised, and Sections CFR 300(a) 506 through 509 of Federal Legislation 94-142, a hearing was conducted at the Administrative Offices of the Washtenaw County Intermediate School District on September 9, 10, 12, 13, 16, 17, 18, 25 and October 1, 1996. Principle parties to this due process

hearing were Mr. and Mrs. Edwin Burilovich on behalf of their son Bradley (petitioners) and the Lincoln Consolidated Schools (Respondents). At issue was the question of a free, appropriate public education for Bradley Burilovich with the focal points (dispute) addressing both procedural as well as substantive issues.

The Burilovich family was represented through the firm of Dykema Gossett by Mr. Richard Landau. Mr. Landau served as spokesman for the Burilovich family. In turn, the Lincoln Consolidated School District was represented by Mr. Michael Eschelbach from the firm of Thrun, Maatsch and Nordberg, P.C. Mr. Eschelbach was the spokesman for the school district.

Preliminary Notes;

1. Exhibits submitted by the Lincoln Consolidated School District will have the prefix D (School District) followed by numerical sequence.
2. Exhibits submitted on behalf of the Burilovich family will have the prefix P (Parent Exhibit) followed by numerical sequence.
3. Citations referring to testimony will be identified by the word Transcript followed by the identification of the person and/or the Volume number and page(s) number.
4. Any abbreviations will be identified in the text of this decision on the first occasion in which they are used.

5. Any documents/correspondence directed to or from this Hearing Officer will be identified by the prefix HO (Hearing Officer) followed by numerical sequence.

Preliminary Comments

A complex chronology of events leading to the Individualized Educational Planning Committee (IEPC) meeting for Bradley (B.J.) Burilovich on May 17, 1996 is articulated and documented under Section I.

BACKGROUND INFORMATION of this decision. It is the Individualized Educational Plan (IEP) which was presented on May 17, 1996 that elicited disagreement from Mr. and Mrs. Burilovich and subsequently resulted in a request for an impartial due process hearing pursuant to R 340.1724 of the Michigan Revised Administrative Rules for Special Education.

When both parties exhausted all attempts to select a mutually agreeable hearing officer, the Michigan Department of Education was contacted with a request to appoint a hearing officer. This hearing officer was selected by the Michigan Department of Education on June 27, 1996.

Consonant with the Sixth Circuit Court rulings in Cordrey v Euckert, 917 F2d 1460 (1990) and Doe v Defendant, 898 F2d 1186 (1990), (that the party contesting the results of an IEPC must carry the burden of proof on an appeal) this hearing officer placed the burden of proof upon representatives for B.J. Burilovich. Since procedural safeguards were a correlate issue in this case, it was also indicated that if representatives

for B.J. Burilovich could present compelling arguments that procedural safeguards were not adhered to by the school district, the determination of burden would be reassessed (HO Exhibit 2).

It should be noted that Linda Burilovich, Ph.D., Bradley's mother, is an Associate Professor in the College of Business at Eastern Michigan University. There is/was no prior acquaintance with this hearing officer, who is a Professor in the College of Education at the same University. This fact was disclosed prior to the hearing and again for the record.

I. BACKGROUND INFORMATION

Bradley (B.J.) Burilovich is a five year-eleven month old boy (B.D. 11/15/96) who resides in the Lincoln Consolidated School District with his parents and two older brothers. His siblings, ages nineteen (19) and twenty-one (21) are currently attending college. Neither brother was ever certified to receive special education (Transcript pp. 70-71).

Mrs. Burilovich notes that her pregnancy with B.J. was uncomplicated, although labor was induced when she was about ten days overdue. B.J.'s early development appeared normal, although language acquisition was slow. When B.J. was about three years of age, his parents enrolled him in the Children's Institute, a pre-school program at Eastern Michigan University; however, this placement was terminated after several days when the director of the Institute indicated that the program could not accommodate a child like Bradley.

At this juncture, it was suggested that Mrs. Burilovich might be able to obtain some help from the local school district (Transcript V- 1 pp. 71-74).

Mrs. Burilovich established contact with Lincoln Consolidated School District, and within a week a home visitation was scheduled. (At this point in time, October, 1993, the Lincoln Consolidated Schools and the Willow Run Schools operated their infant/toddler and pre-primary (PPI) programs as a consortium. Willow Run housed the program and was the operating school district.) Two staff members, Suzanne Boyer and Carol Blackburn, visited the Burilovich home and did an initial screening with B.J. (Transcript V-1 pp. 74075; District Exhibit 2).

On October 29, 1993, Mrs. Burilovich signed a form giving parental permission to evaluate B.J. (District Exhibit 1). Subsequently, B.J. was evaluated by a school psychologist (Amy Stamps) and by a speech and language pathologist (Lin Nichols). A Multi disciplinary Evaluation Team (MET) report was generated on December 10, 1993 (Parent Exhibit 1) and an initial IEPC for Bradley Burilovich was held on December 17, 1993. This IEPC found Bradley eligible for special education services as pre-primary impaired under R 340.1754 and called for PPI services twice a week (one hour sessions) and Speech and Language Therapy R 340.1745) consultations from six to eight times per year. Specialized transportation was marked as not required (Parent Exhibit 2). Mrs. Linda Burilovich signed the IEP document indicating that she (a) understood the contents, (b) received and/or was informed of the procedural safeguards, and (c) requested implementation of the program (Parent Exhibit 2).

Mr. and Mrs. Burilovich continued to be perplexed about B.J.'s condition and ultimately sought evaluations at the University of Michigan Medical Center. In February of 1994 they brought Bradley to the Developmental Disorder Clinic at the University of Michigan Adult/Child Psychiatric Hospitals to see Dr. Luke Y. Tsai. At the conclusion of his evaluation, Dr. Tsai informed Mr. and Mrs. Burilovich that Bradley fit the diagnostic classification of Autistic Disorder (Transcript I pp. 92-93) (Parent Exhibit 3). A teacher from the Willow Run School District, Sue Boyer, was present for the latter part of the evaluation, and she was aware of the diagnosis (Transcript V-1 p. 93). Mrs. Burilovich stated that she later provided a copy of Dr. Tsai's report to a representative (Sue Boyer) of the Willow Run School District (Transcript V-1 p. 94).

At some point between Dr. Tsai's evaluation and the end of the school year, B.J.'s time in the PPI program at Willow Run was increased from two (2) to three (3) hours a week. This change was not indicated in a IEP (Transcript V-l, p. 99).

On June 6, 1994, Linda Burilovich wrote a letter to Dr. Yomtoob, the Superintendent of Willow Run Schools, in which she identified her son B.J. as autistic. Concomitantly, she expressed several other concerns including her dissatisfaction with the amount of program time B.J. was receiving and the school resources which were made available (Parent Exhibit 4). Dr. Stanley Wixom, Director of Special Education for the Willow Run Schools responded by correspondence dated June 16, 1994. In Dr. Wixom's response, no comment was directed to Dr. Burilovich's

concerns about B.J.'s program and/or diagnosis of autism (Parent Exhibit 5).

After Dr. Tsai's diagnosis of autism for B.J., Mr. and Mrs. Burilovich made a concerted effort to learn more about the condition. In reviewing the literature, Mrs. Burilovich became aware of Dr. Ivar Lovaas and his work with autistic children. She obtained program information which described the implementation of discrete trial training (DTT) and began one-to-one DTT with B.J. for about one hour per day in the home setting (Transcript Vol. 1 pp. 96-98). In May of 1994, the Burilovichs also hired Sue Boyer (B.J.'s teacher at Willow Run) under a private arrangement to work with B.J. at the Burilovich's home for approximately six (6) hours per week. This arrangement ended in the summer of 1994 (Transcript Vol. 1 pp. 100-103; 111-112).

Mr. and Mrs. Burilovich had privately concluded that they were not going to send B.J. to the Infant-Toddler program in the Fall of 1994; however, when they were notified that Bradley would be transferred from the Willow Run program to a Pre-Primary Impaired (PPI) program operated by the Lincoln Consolidated Schools, they signed another Parental Permission to Evaluate form (Transcript Vol. 1 pp. 113-116; Parent Exhibit 1 p. 13).

Bradley began attending the PPI program at Lincoln in September of 1994 for four days a week, two-and-a-half hours a day, and problems began to manifest (Transcript Vol. 1 pp. 116-118). There were staff recommendations to cut back drastically on time; however, the Burilovichs refused -- because at that time, they had no other options for Bradley

and there was no home program to fully engage him (Transcript Vol. 1 pp. 130-121). Discrete Trial Training did continue at home on a private basis.

On October 1, 1994, Mr. and Mrs. Burilovich had Patricia Meinhold, Ph.D., visit their home and observe B.J. Dr. Meinhold is an Assistant Professor in the Department of Psychology at Western Michigan University, and she has extensive experience in the development of behavioral programs for autistic children (Parent Exhibit 47). During this initial meeting, Dr. Meinhold demonstrated some DTT techniques and assisted the Burilovichs in developing some goals for B.J. She also concluded that B.J. met the criteria as an appropriate candidate for DTT approach (Transcript Vol. 2 pp. 316-318) and suggested that Mr. and Mrs. Burilovich request some help from the school in implementing a DTT approach for Bradley (Transcript Vol. 1 pp. 126-127).

On October 5, 1994, a "transitions" IEPC for B.J. Burilovich was held at the Lincoln Consolidated School District. At this meeting, the parents requested that the school district help them by implementing some DTT programming with B.J. Representatives for the school district indicated that this could not be accommodated (Transcript Vol. 1 p. 127). The IEP document identified B.J. as eligible under PPI and established his program as two and one half hours per day for four days a week. Direct speech and language therapy was to be provided from forty to eight (40-80) minutes per week, and specialized transportation was to be provided (Parent Exhibit 6). Mrs. Linda Burilovich signed the document, acknowledging agreement with the program and indicating that she had been informed of procedural safeguards.

Independent from the aforementioned IEP, Betsy McMillan (who was to be B.J.'s teacher) volunteered to do thirty (30) minutes of DTT daily on her own with Bradley if he would arrive at school before the school day began (Transcript Vol. 1, pp. 127-128).

Mr. and Mrs. Burilovich continued to develop B.J.'s home program by hiring student tutors and by increasing their own involvement. By the end of November, 1994, Bradley was receiving a minimum of twenty (20) hours a week of DTT at home (Transcript Vol., p. 135).

In January of 1995, the Burilovichs informed the school district that they decided to reduce B.J.'s time in the school program from four (4) days a week down to two (2) days a week. This information was conveyed via Betsy McMillan to her "boss," and apparently the school district concluded that there was no need for another IEPC (Transcript, Vol. 1, pp. 138-139). By the end of the 1994-95 school year, B.J. was receiving 25-30 hours of DTT a week at home (Transcript Vol. 1, p. 147).

No program was provided for B.J. Burilovich by the Lincoln School District during the summer of 1995; however, the Burilovichs sent B.J. to a day care center and paid one of their tutor/therapists to accompany him and to try to help him interact with other children (Transcript Vol., p. 148).

At this juncture, it is appropriate to note that Mr. Ro: ald Greiner became the Director of Special Education for the Lincoln Consolidated School District on July 1, 1995. From January of 1995 to June of 1995, Mr. Greiner was a

Supervisor of Special Education with the Lincoln Consolidated School District Prior to January of 1995, Mr. Greiner was a Supervisor of Special Education with the Washtenaw Intermediate School District (WISD). In July of 1996, Ronald Greiner returned to Washtenaw ISD as a Supervisor of Special Education (Transcript, Vol. 4, pp. 775-778).

In September of 1995, Mrs. Burilovich notified the Lincoln Schools that B.J. would only be attending the school program one day a week. B.J. continued to receive DTT at home during the fall of 1995. There was also an apparent request from the Burilovichs to delay the annual IEPC review meeting (due by October 4, 1995) and a response by Mr. Greiner rescheduling the review IEPC for November 10, 1995 and again to December 1, 1995 (Parent Exhibits 7, 8, 9).

On November 28, 1995, Mr. Burilovich visited B.J.'s classroom (unannounced) and asked to videotape B.J. in his classroom (Parent Exhibit 50). Mr. Burilovich did the videotaping at the request of his wife because of their concerns after she observed B.J.'s behavior in the classroom earlier that month. Mrs. Burilovich wanted to document her concerns (Transcript, Vol. 1, pp. 155-157).

Prior to the December 1, 1995 IEPC meeting, the Burilovichs had some contact with an attorney and with the Association for Community Advocacy in Ann Arbor. Mrs. Burilovich testified that it was at this point where she became aware of her rights -- and B.J.'s right to an appropriate education (Transcript, Vol. 1, pp. 153-154) (Parent Exhibit 9). At the IEPC meeting on December 1, 1995, Mr. and Mrs.

Burilovich submitted a list of requests along with what she felt was appropriate to programming for her son B.J. (Transcript, Vol. 1, pp. 152-154, 166-168) (Parent Exhibit 11). They also presented videotapes which contrasted B.J.'s behavior/performance at school in contrast to his progress at home with DTT (Transcript. Vol. 7, pp. 1480-1481). This IEPC meeting was adversarial with the Burilovichs requesting that the district develop an IEP structured around goals and objectives with a DTT approach and with the district unable to agree because of insufficient goals and objectives (Transcript. Vol. 1, pp. 168-173: Vol. 5, pp. 1072-1073). The meeting ended without closure.

After the inclusive IEPC of December 1, 1995, a series of telephone conversations between Mr. Greiner and the Burilovichs was followed by correspondence in which Mr. Greiner proposed (in broad outline) what an appropriate program for B.J. could conceivably include. It was apparent that Mr. Greiner was unaware at this time of Dr. Tsai's diagnosis of B.J. Burilovich as autistic (Transcript, Vol. 1, pp. 92-94, 180) (Parent Exhibits 3, 12; HO Exhibits 11, 12, 13).

Through their attorney, the Burilovichs requested an independent educational evaluation (IEE) on December 28, 1995 (Parent Exhibit 13). This request was denied by Mr. Greiner, and he then initiated a due process hearing request regarding the IEE (Parent Exhibit 14). Enclosed with this letter were documents identifying procedural rights and a parent handbook (Id.). The request for the IEE hearing was held in abeyance and the district ultimately agreed to pay for the IEE (Transcript, Vol. 2, p. 327).

On January 24, 1996, Mr. Greiner directed district personnel to evaluate B.J. Burilovich for autism (Parent Exhibit 16). This evaluation included a home observation on January 31, 1996 by Mr. Greiner; Sherry Senunas, a school social worker; and Mary Lupini, a school psychologist. Subsequent to this visitation, a MET report was generated on February 9, 1996 which indicated that Bradley Burilovich met the criteria for autism, as specified by law (Parent Exhibit 18).

The parents contacted Patricia Meinhold, Ph.D., to observe B.J. at home on February 2, 1996 for the purpose of completing her IEE (Parent Exhibit 2.3). On February 12, 1996, Dr. Meinhold faxed the school district a draft of recommended IEP goals for B.J. based upon her evaluation and observations (Parent Exhibit 17). Prior to February 12, 1996, Dr. Meinhold also had several conversations with Mr. Greiner in which she conveyed the basic components of her recommendations as well as her role/involvement in DTT training for school staff who would be involved with B.J. (Parent Exhibit 19, 21) (Transcript, Vol. 2, pp. 328-335).

On March 6, 1996, Ronald Greiner submitted to Mr. Landau, the parent's attorney, a proposal from the Lincoln Consolidated Schools outlining a "free appropriate public education" for B.J. Burilovich and the commitment that the district was willing to make for B.J.'s educational program (Parent Exhibit I9). Some related concerns were expressed in Mr. Greiner's correspondence to Dr. Meinhold (Parent Exhibit 21).

Immediately prior to the IEPC meeting of March 18, 1996, Mr. Greiner met with his staff to prepare for B.J.'s IEPC (HO

Exhibit 14). The IEPC convened, and Dr. Meinhold discussed her recommendations and responded to questions raised by the staff. The school district then requested to meet privately, without the parents, Dr. Meinhold, and their legal counsel (Mr. Landau). This request was ignored (Transcript, Vol. 6, p. 1125). When the IEPC resumed, Mr. Greiner presented the school's proposed program. A summation of the eight program components offered by Mr. Greiner in the presence of his staff, the school district's counsel, Mr. and Mrs. Burilovich, and their counsel included:

1. 35 hours of educational instruction, 30 hours of which would be provided in a discrete trial format, the balance consisting of exposure to general education.
2. The program would be implemented by two paraprofessionals and one back-up para-professional, all of whom would be trained in the implementation of DTT.
3. The paraprofessionals would work with B.J. on a one-to-one basis during his DTT sessions as well as his general education exposure.
4. Weekly team meetings to which the parents would be invited to participate.
5. The District would accept the goals and objectives developed by Dr. Meinhold.
6. Dr. Meinhold would train staff, monitor the program, and provide oversight for the program.
7. An extended school year of eight to ten weeks, with six hours per day of DTT as well as contact with non-handicapped peers.

8. A transition program from a home based DTT program to a school based DTT program, the transition to occur over an eight to ten week period.

Note: These were accurately summarized by counsel for the Burilovich family and reflect the content of an audio-tape of the IEPC meeting (Parent Exhibit 51) and in testimony which reviewed the audio-tape (Transcript, Vol. 7, pp. 1343-1380).

Mr. Greiner presented the school's proposed program for B.J. Burilovich, and this proposed program was accepted by the parents (Transcript Vol. 6, p. 1136). The school district then offered to write up the IEP at this point; however, this was set aside when the issue of reimbursement came up. When discussions on reimbursement materialized, the staff was asked to leave (Transcript, Vol. 6, pp.1126-1127). There was no testimony that any further program elements were discussed and all that remained to be accomplished was to formally write up the IEP consistent with the agreed upon program and consonant with R 340.1721e(3) of the Michigan Revised Administrative Rules for Special Education. (Any individual who disagrees in whole or in part with the IEP could do so under R 340.1721e(4)). The reimbursement issues were not resolved at the March 18, 1996 IEPC and the meeting adjourned.

At the time of adjournment, there was a confirmed understanding that Dr. Meinhold was going to begin Discrete Trail Training (DTT) with school district staff the next week, as articulated in Mr. Greiner's proposed program (Transcript

Vol. 6, pp. 1025; 1155) (Parent Exhibit 24). The scheduled DTT training sessions by Dr. Meinhold was canceled by Mr. Greiner because of snow days (Transcript Vol. 5, pp. 1025-1027) (Parent Exhibit 24). There was no indication that they had ever been rescheduled.

On March 19, 1996, Mr. Greiner transmitted a memo to staff members thanking them for their participation and input regarding B.J. Burilovich's IEPC. There was no suggestion that the IEP was incomplete nor was there any indication that the IEPC would be reconvened (HO Exhibit 15).

On April 4, 1996, a memo was sent from Marilyn Goodsman, Principal at Lincoln Early Elementary School, to staff members who participated in B.J.'s IEPC of March 18, 1996. Essentially, it alluded to "our recent issue" and indicted that Mary Ann (sic) Miller would speak and provide "insight" as to the Lovas (sic) method. The meeting was scheduled for April 17, 1996 (HO Exhibit 16).

Mr. Landau, counsel for Mr. and Mrs. Burilovich contacted Mr. Greiner via telephone and correspondence on April 16, 1996 inquiring why the IEP document had not been prepared and/or presented (Parent Exhibit18). In a subsequent letter to Mr. Greiner, Mr. Landau inquired as to (1) why transition programming for B.J. had not materialized and (2) when the IEP would be completed. Violations of R 340.1721c were cited and the possible filing of civil action to attain closure was mentioned.

Also on April 16, 1996, Mr. Greiner sent a memo to staff members regarding "Burilovich IEPC Meeting" discussing a

"revision" of goals and objectives and scheduling another meeting on April 26, 1996 (HO Exhibit I7). It is significant to note that Mr. and Mrs. Burilovich and their counsel were not invited to nor informed of these meetings. Another memo to the same mailing was transmitted on April 29, 1996. This was regarding "B.J.'s Goals and Objectives" (HO Exhibit 18). An additional memo dated May 6, 1996 was entitled "B.J.'s Revised Goals and Objectives and Daily Schedule." There was an attachment which was "faxed to the Parents Attorney on 5/7/96." This same memo rescheduled the IEPC meeting for May 17, I996 (HO Exhibit 19) (Parent Exhibit 26). The IEP proposal accompanying a letter dated May 6, 1996 differed from the one which was proposed on March 18, 1996. It is also worth noting that Dr. Meinhold was not invited to the May 17, 1996 IEPC.

At the May 17, 1996 IEPC Mr. and Mr. Burilovich expressed concerns about the appropriateness of the program and why the proposed program was so radically different from the one they had agreed upon. They were also upset that they were not a part of the planning process (Transcript Vol. 1, pp. 209-216). On May 23, 1996, Mr. and Mrs. Burilovich signed the IEPC form indicating that they did not agree with the report and they requested an impartial due process hearing pursuant to R 340.1724 of the Michigan Revised Administrative Rules for Special Education (Parent Exhibit 29) (Transcript Vol. 1, p. 216).

II. ISSUES OF THE SPECIAL EDUCATION HEARING

A. The issues under contention at this hearing revolve around whether the disputed IEPC of May 17, 1996 provided a "free appropriate public education for Bradley (B.J.) Burilovich as required by both federal and state law. Inherent to this primary issue are subsidiary issues regarding adherence to procedural safeguards and parental request for reimbursement.

B. POSITION OF THE PARTIES

B.I. It is the position of the Burilovich family (petitioners) and their counsel that the contested IEPC developed for B.J. Burilovich does not meet his unique needs. Integral to this posture is the contention that procedural safeguards were violated, shifting the burden of proof. It is also asserted that reimbursement to the parents is warranted for costs incurred with providing B.J.a program at home.

SPECIFIC ISSUES

The specific issues as put forth by Richard Landau, legal counsel for the Burilovich family are:

1. Does the IEP here on appeal constitute a free appropriate public education (FAPE) for the student in terms of providing him with "special education" meeting his "unique needs" and the other requirements of the IDEA and MMSEA?

2. Was there any justification under the IDEA, MMSEA or their respective regulations for Respondent to unilaterally withdraw it's proposal of special education programming and related services as made at the March 18, 1996 IEPC?

3. If the IEP here on appeal is found not to provide the student with a FAPE, what array of programs and services are necessary to provide him with a FAPE as required under the IDEA, MMSEA and their respective regulations?

4. If the IEP here on appeal is found not to provide the student with a FAPE, to what extent is Respondent obligated to reimburse the parents for the cost they incurred in providing the student with a program at home?

5. Were the evaluations conducted by Respondent prior to the development of the IEP here on appeal "appropriate" within the meaning of the IDEA, MMSE and their respective regulations?

6. Did Respondent comply with the procedural requirements of the IDEA, MMSEA and their respective regulations?

7. If Respondent failed to comply with the procedural requirements of the IDEA, MMSEA and their respective regulations, should Respondent bear the burden of proving that its IEP provides a FAPE?

In support of their position, representatives for Bradley (B.J.) Burilovich submitted a listing of fifty-two (52) Exhibits as evidence and submitted the name of twenty-seven (27) individuals as potential witnesses. (Note: Many of the exhibits and witnesses were mutual, and not all of them were referred to and/or called upon.)

PETITIONERS' EXHIBIT LIST

1. MET Report, December 10, 1993
2. IEP, December 17, 1993
3. University of Michigan Evaluation Report, March 23, 1994

4. Correspondence, June 6, 1996
5. Correspondence, June 16, 1994
6. IEP, October 5, 1994
7. Correspondence, October 26, 1995
8. IFPC Invitation, October 26, 1995
9. Correspondence, November 13, 1995
10. Correspondence, November 29, 1995
11. List submitted by Petitioners at December 1, 1995 IEPC
12. Correspondence, December 7, 1995
13. Correspondence, December 28, 1995
14. Correspondence, January 12, 1996
15. Correspondence. January 18, 1996
16. Memorandum, January 24, 1996
17. Fax, February 6, 1996
18. MET Report, February 9, 1996
19. Correspondence, March 6, 1996
20. IEPC Invitation, March 11, 1996
21. Correspondence, March 11, 1996
22. Correspondence, March 14, 1996
23. Psychological Evaluation Report, March 14, 1996
24. Correspondence, April 22, 1996
25. Correspondence, April 22, 1996
26. Correspondence, May 6, 1996
27. IEPC Invitation, May 7, 1996
28. IEP, May 17, 1996 (as accepted by Respondent)
29. IEP, May 17, 1996 (signed in disagreement by Petitioners)
30. Correspondence, May 28, 1996
31. Summary of progress as completed by Petitioners
32. O. I. Lovaas, Behavioral Treatment and Normal Educational and Intellectual Functioning in Young

Autistic Children, 55 Journal of Consulting and Clinical Psychology 3 (1987).

33. E. Schopler, A. Short and G. Mesibov, Relation of Behavioral Treatment to "Normal Functioning:" Comment on Lovaas, 57 Journal of Consulting and Clinical Psychology 162 (1989).
34. O.I. Lovaas, T. Smith and J. J. McEachln, Clarifying Comments on the Young Autism Study: Reply to Schopler. Short and Mesibov, 57 Journal of Consulting and Clinical Psychology 165 (1989).
35. T. Smith, Autism, in Handbook of Effective Psychotherapy 107 (Thomas Giles ed., 1993).
36. G. Green, Evaluating Claims About Treatments for Autism, in Behavioral Intervention for Young Children with Autism 15 (C. Maurice ed., 1996).
37. G. Green, Early Behavioral Intervention for Autism, in Behavioral Intervention for Young Children with Autism 29 (C. Maurice ed., 1996).
38. T. Smith, Are Other Treatments Effective, in Behavioral Intervention for Young Children with Autism 45 (C. Maurice ed., 1996).
39. S. Anderson, M. Tares and B. O'Malley Cannon, Teaching New Skills to Young Children with Autism, in Behavioral Intervention for Young Children with Autism 181 (C. Maurice ed., 1996).
40. G. Shook and J. Favell, Identifying Qualified Professionals in Behavior Analysis, in Behavioral Intervention for Young Children with Autism 221 (C, Maurice ed., 1996).
41. O.I. Lovaas, The UCLA Young Autism Model of Service Delivery, in Behavioral Intervention for

Young Children with autism 241 (C. Maurice ed., 1996).

42. Correspondence, November 3, 1993
43. Interview with Ivar Lovaas, Autism Society of America, 1994.
44. Various reports from Autism Research Review International.
45. Workshop Information Packet, Clinic for Behavioral Treatment of Children, UCLA >
46. Report of the Committee on "Lovaas/Style" Intervention, August 1996.
47. Curriculum Vitae, Patricia Marie Meinhold, Ph.D.
48. Resume, Peter A. Holmes, Ph.D.
49. Videotape of Home Program Sessions
50. Videotape of School Observation
51. Audiotape of March 18, 1996 IEPC (original in custody of Respondent).
52. All Exhibits submitted by Respondent pursuant to R 340.1724b(1)(c).
53. Any rebuttal exhibits, as necessary.

PETITIONERS' WITNESS LIST

1. Edward Burilovich
2. Linda Burilovich
3. Bradley Burilovich
4. Patricia M. Meinhold, Ph.D.
5. Peter A. Holmes, Ph.D.
6. Ron Greiner
7. Lin Gerber Nichols
8. Amy Maria Stamp
9. Evelyn Griffin

10. Leslie B. Rosenwasser
11. Pamela McMillan
12. Teresa Wilson
13. Eldridge L. Chism, Jr.
14. Elizabeth McMillin
15. Andrea Polhamous
16. Sherry Senunas
17. Mary Lupini
18. Luke Tsai, M.D.
19. Dena A. Stevens
20. Mary Spence
21. Mary Ann Miller
22. Deborah Dorenkamp
23. Susan Boyer
24. Custodian of the Records for the Lincoln Consolidated Schools
25. All witnesses listed by Respondent
26. All necessary rebuttal and surrebuttal witnesses
27. Any witnesses deposed prior to or during the hearing.

BII. It is the position of the Lincoln Consolidated School District (Respondents) and their counsel that the contested IEPC developed for Bradley (B.J.) Burilovich does meet his unique needs. Concomitantly, they maintain that procedural safeguards were adhered to in the development of B.J.'s program(s).

SPECIFIC POSITIONS

The specific posture of the school district as set forth by Mr. Michael Eschelbach, legal counsel for Lincoln Consolidated Schools is that:

1. The May 17, 1996 IEP as proposed by the school district provides a free appropriate public education for B.J. Burilovich.

2. The burden of proof remains with the parents (who challenged the IEP).

3. No reimbursement to the parents is required or justified.

In support of their position, representatives for the Lincoln Consolidated School District submitted a listing of thirty-three (33) Exhibits as evidence and submitted the names of fifteen (15) individuals as potential witnesses. (Note: Many of the exhibits and witnesses were mutual, and not all of them were referred to and/or called upon.)

RESPONDENTS' EXHIBIT LIST

1. Special Ed. Referral & Parental Permission to Evaluate Form, October 29, 1993.
2. Multi disciplinary Evaluation Team Report, December 10, 1993.
3. Correspondence, December 10, 1993.
4. IEP, December 17, 1993.
5. Special Ed. Referral & Parental Permission to Evaluate Form, September 27, 1994.
6. IEP, October 5, 1994.
7. IEPC Invitation, October 25, 1995.
8. Correspondence October 26, 1995.
9. IEPC Invitation October 26, 1995.
10. Correspondence November 13, 1995.

11. Correspondence December 7, 1995.
12. Correspondence. December 28, 1995.
13. Correspondence January 12, 1996.
14. Correspondence January 18, 1996.
15. Fax, January 23, 1996.
16. Memorandum, January 24, 1996.
17. MET Report, February, 9, 1996.
18. Fax, February 6, 1996.
19. Correspondence, March 6, 1996.
20. IEPC Invitation, March 11, 1996.
21. Correspondence, March 11, 1996.
22. Correspondence, March 14, 1996.
23. Fax, March 18, 1996.
24. Correspondence, April 16, I996.
25. Correspondence, April 22, 1996.
26. Correspondence, May 6, 1996.
27. IEPC Invitation, May 7, 1996.
28. IEP, May 17, 1996 (as accepted by Respondent).
29. IEP, May 17, 1996 (signed in disagreement by Petitioners).
30. Correspondence, May 28, 1996.
31. Commentary on Lovaas.
32. Model Elementary School map.
33. Blank Observation Form.

RESPONDENTS' WITNESSES LIST

1. Sherry Senunas (testimony concerning observation and evaluation of B.J. Burilovich, IEPC process, and proposed program).

2. Lin Gerber Nichols (testimony concerning observation and evaluation of B.J. Burilovich, IEPC process and the proposed program).
3. Anne Marie Allen (testimony concerning proposed program).
4. Amy Stamps (testimony concerning observation and evaluation of B.J. Burilovich, the IEPC process, the proposed program, and autistic students).
5. Rosemary Krumrei (testimony concerning proposed program and experience with special education and AI students).
6. Ron Greiner (testimony concerning the history of the Burilovichs' contacts with the School District, the IEPC process, the proposed program, the ability of the School District to provide an appropriate program for B.J. Burilovich).
7. Mary Ann Miller (testimony concerning autism, educational programming for autistic students, appropriateness of proposed program for B.J. Burilovich).
8. Mary Spence (testimony concerning autism, educational programming for autistic students, appropriateness of proposed program for B.J. Burilovich).
9. Debra Dorenkamp (testimony concerning autism, educational programming for autistic students, appropriateness of proposed program for B.J. Burilovich).
10. Dr. Luke Tsai (testimony concerning evaluation of B.J. Burilovich).
11. Dr. Gary Mesibov (testimony concerning autism, autistic students, methods of educational programming

for autistic students, appropriateness of proposed program for Burilovich).

13. Sally Cairo (testimony regarding methods of educational programming for autistic students and affect of discrete trial training methodology).
14. Kathy Manta (testimony regarding methods of educational programming for autistic students and affect of discrete trial training methodology).
15. Pam Westmeier (testimony regarding methods of educational programming for autistic students and affect of discrete trial training methodology).

To complete the record, there is also a list of exhibits which were designated as the hearing officer exhibits.

HEARING OFFICER EXHIBIT LIST

1.a. Letter of hearing officer appointment dated 6/27/96.
1. Correspondence to representative(s) for Burilovich family and for school district dated 7/15/96.
2. Scheduling correspondence dated 7/17/96.
3. Correspondence from Eschelbach to Landau requesting home observation and videotaping dated 8/16/96.
4. Correspondence form Eschelbach to Landau again requesting home observation and videotaping dated 8/22/96.
5. Correspondence from Eschelbach to Gottwald containing protocol sequence and dated 8/28/96.
6. Certified correspondence from Eschelbach to Gottwald requesting a directive to allow home observation and videotaping dated 8/30/96.

7. Correspondence from Landau to Gottwald responding to requests for observation and videotaping dated 9/3/96.
8. Correspondence from Eschelbach to Landau with listing of school witnesses and disclosure (copies) of school district exhibits dated 9/4/96.
9. Brief by Eschelbach requesting observations dated 9/8/96.
10. Brief by Landau in opposition of observations dated 9/11/96.
11. Photocopy of miscellaneous record notations regarding B.J.
12. Teacher's Questionnaires - Luke Y. Tsai, M.D.
13. University of Michigan Medical Center (check list) from Developmental Disorders Clinic.
14. Memo to selected staff and Eschelbach from Greiner dated 3/11/96 with attachment.
15. Memo to selected staff from Greiner regarding B.J. Burilovich's IEPC Meeting dated 3/19/96.
16. Memo to selected staff from Goodsman dated 4/4/96.
17. Memo from Greiner to selected staff dated 4/16/96 regarding Burilovich IEPC.
18. Memo from Greiner to selected staff regarding B.J.'s Goals and Objectives (4/29/96).
19. Memo from Greiner to selected staff regarding B.J.'s revised goals and objectives.
20. Memo from Greiner to selected staff regarding "Update: Lovaas Due Process Hearing" (dated 8/16/96).

NOTE: Throughout the hearing/transcript, a disproportionate amount of reference is

directed towards the Petitioners exhibits. These exhibits were numbered and subsequently page numbered consecutively. Since many/most of the Respondents exhibits were identical, in most situations it was expedient to refer to the former exhibits, and both parties did so.

B-III. Neither the petitioner or the respondent disputes the fact that Bradley (B.J.) Burilovich is handicapped and eligible for Special Education services as defined under R 340.1702 pursuant to the specific determination of autism as defined under R 340.1715 of the Michigan Revised Rules for Special Education.

B-IV. At the designation of Mr. and Mrs. Burilovich, the hearing was designated as closed and the witnesses were sequestered.

III. HEARING OFFICER DECISION

Based upon the evidence and testimony presented at this hearing, it is the determination of this hearing officer to address the issues (which were identified by the petitioners) both individually and collectively in rendering his decision. To the extent that sequencing and interactions impact the decision(s), this hearing officer has elected to arrange his decision(s) in a flow

that allows closure on specific issues wherever possible.

1. Issue: Were the evaluations conducted by the respondent prior to the development of the IEP here on appeal "appropriate" within the meaning of the Individuals with Disabilities Education Act (IDEA), the Michigan Mandatory Special Education Act (MMSEA), and their respective regulations?

1. Decision: This hearing officer finds the evaluations which were conducted prior to the development of the contested IEP to be appropriate within the meaning of IDEA, MMSEA and their respective regulations.

1. Rationale: Within Part I of the General Provisions in the Revised Administrative Rules for Special Education, R 340.1701(h) defines a comprehensive evaluation and (1) defines consent:
(h) "Comprehensive evaluation" means an evaluation that is conducted for the purpose of determining eligibility for special education and related services and for determining the current level of educational performance. The multi disciplinary team, members of the team, the individualized educational planning committee, or a hearing

officer shall determine the comprehensiveness of an evaluation based on individual needs.

(i) "Consent" means an agreement, in writing, that states all of the following:

(i) The parent has been fully informed, in his or her native language or through another mode of communication, of all information that is relevant to the activity for which consent is sought.

(ii) The parent understand and agrees to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records, if any, that will be released and to whom.

(iii) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

Under R 340.1715 Autism defined: determination (4) reads:

(4) A determination of impairment shall be based upon a comprehensive evaluation by a multi disciplinary evaluation team. The team shall include, at a minimum, a psychologist or psychiatrist, a teacher

of speech and language impaired, and a school social worker.

Under Part 2, Rule 340.1721a addresses the evaluation procedure:

Rule 2la.(1) Each student suspected of being handicapped shall be evaluated by a multi disciplinary evaluation team as defined in R 340.1701a(e). Members of the team may include other qualified personnel in areas related to the suspected disability, including, where appropriate, the following: health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor ability.

(2) The multi disciplinary team shall complete a diagnostic evaluation, including a recommendation of eligibility, and shall prepare a written report to be presented to the individualized educational planning committee by the appointed multi disciplinary team member. The report shall include information needed to determine eligibility and educational data which identifies the person's current level of educational performance. Information presented to the individualized educational planning committee shall be drawn from a variety of sources, including parent input, aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, adaptive behavior, and other pertinent information. No single procedure shall be used as the sole criterion for determining an appropriate educational program for a person.

Respondents Exhibit 1 is a Special Education Referral and Parent Permission to Evaluate Form signed by Linda Burilovich on October 29, 1993. Respondents Exhibit 2 contains the Multi disciplinary Educational Team (MET) report generated on December 10, 1993. Inherent to this document are reports and signatures from (a) Sue Boyer - Special Education Teacher, (b) Amy Stamps - School Psychologist, (c) Lin Gerber Nichols - Speech and Language Pathologist, (d) Evelyn Griffin - School Nurse and Leslie Rosenwasser - School Social Worker. The initial IEPC of December 17, 1993 placed B.J. in a consortium pre-primary (PPI) program operated by the Willow Run School District. No additional evaluations were done by school personnel when B.J. Burilovich transferred to the PPI Program operated by the Lincoln Consolidated Schools in September of 1994; however, another Permission to Evaluate Form was signed on September 27, 1994 (Petitioner Exhibit 1, p. 13).

The next school evaluation was conducted on January 31, 1996 when a home visitation was made by a Special Education team comprised of Ron Greiner - Director of Special Education; Sherry Senunas - School Social Worker; Mary Lupini - School Psychologist. The Vineland Adaptive Behavior Scale was administered

On February 9, 1996, a MET Team convened and wrote a report which concluded that B.J. Burilovich met the criteria for Autistic Impaired as specified by law. The sources of information were reported as a (1) home visitation by school social worker, school psychologist and special education supervisor, (2) a University of Michigan Medical report dated March 25, 1994 (Petitioners Exhibit 3) along with the MET

Team report of 12/10/93. (3) Completion of the Childhood Autism Rating Scale by team members on February 5, 1996, and (4) completion of the Vineland by the school psychologist at the home on January, 31, 1996 (Respondent Exhibit 17).

Supplementing the aforementioned evaluations was an Independent Educational Evaluation (IEE) done by Patricia Meinhold, Ph.D. on February 2, 1996 with a written report date of March 14, 1996. This evaluation was ultimately paid for by the school district and faxed to the district on March 18, 1996 (Petitioners Exhibit 23).

The nature and adequacy of the evaluations comport with the meaning and intent of IDEA and MMSEA and are within prescribed time lines.

2. Issue: Did the respondent comply with the procedural requirements of the DEA and MMSEA?

Discussion:

There are several dimensions which are integral to this issue. One strand involves the issue of parental notification of procedural rights. A second strand addresses timely recertification of B.J. Burilovich for services as a child with autism. A third strand relates to parental inclusion and involvement in the IEPC process.

As will be evident, the determinations/ decisions made regarding the aforementioned

issues may subsume other aspects and/or render them moot.

2.1. Issue of Parental Notification of Procedural Rights.

2.1. Decision: This hearing officer finds no violation regarding parental notification of procedural rights.

2.1. Rationale: The Sixth Circuit Court is clear that a party challenging the terms of an IEP bears the burden of proving by a preponderance of evidence that an IEP is defective either procedurally or substantively (Doe v Defendant, 898 F2d 1186 6th Ar 1990; Cordrey v Euckert, 917 F2d 1460 - 6 Ar 1990). In this particular situation, the parents and their counsel failed to carry the burden.

Although Mrs. Linda Burilovich testified that (prior to January, 1996) she never was advised of procedural safeguards and that she never received materials about parental rights (Transcript Vol. 1, pp. 115-116, 133), Mrs. Burilovich did sign a number of forms indicating that she had, indeed, received this information and/or understood the materials (District Exhibits 1, 4, 5, 6). Mrs. Burilovich did proffer an explanation (i.e.) that she interpreted procedural safeguards as pertaining to physically handicapped children (Transcript Vol. 1, pp. 80-81; Vol. 5, pp. 657-660).

Lin Nichols, a speech pathologist, testified that procedural rights were discussed with parents, as early as B.J.'s 1993 IEPC (Transcript Vol. 7, p. 1461). This was contradicted by her in later testimony (Transcript Vol. 8, p. 1611). Other school district testimony indicated that it was routine procedure to send out a handbook of parental rights at the time of initial referral (Transcript Vol. 5, p. 1093). Testimony from witnesses for both parties continued to vacillate on this issue throughout the hearing. It is worth noting that in two separate cases the Office of Civil Rights found that a parents signature on an IEP form acknowledging her rights was significant (Metropolitan Nashville (TN) Public Schools, 241DELR (OCR, 1995); Fairfield-Suisun (CA) Unified School Districts 211DELR 1007 (OCR 1994).

There is an inadequate/insufficient factual basis in the testimony and evidence presented before this hearing officer to conclude that Mr. and Mrs. Burilovich were not informed of their procedural rights; consequently, the petitioners have failed to carry the burden on this issue.

2.2. Issue of District Failure to Recertify B.J. Burilovich in a Timely Manner as Autistic Impaired.

2.2. Decision: This hearing officer cannot conclude that the District failed to recertify B.J. Burilovich under Autism in a timely manner or that such in action denied him of any rights under IDEA or MMSEA.

2.2. Rationale: Bradley Burilovich was found eligible for Special Education services on December 17, 1993 as Pre-Primary Impaired under R 340.1711, of the Michigan Revised Administrative Rules for Special Education. This initial IEP was conducted when B.J. was 3 years-1 month old. Rule 340.1711 states:

"Preprimary impaired" defined; determination.

Rule 11.(1) "Preprimary impaired" means a child through 5 years of age whose primary impairment cannot be differentiated through existing criteria within R 340.1703 to R 340.1710 or R 340.1713 to R 340.1715 and who manifests an impairment in 1 or more areas of development equal to or greater than ½ of the expected development for chronological age, as measured by more than 1 developmental scale which cannot be resolved by medical or nutritional intervention. This definition shall not preclude identification of a child through existing criteria within R 340.1703 to R 340.17100 or R 340.1713 to R 340.1715.

(2) A determination of impairment shall be based upon a comprehensive

> evaluation by a multi disciplinary evaluation team.
> (3) A determination of impairment shall not be based solely on behaviors relating to environmental, cultural, or economic differences.

The goals and objectives which were developed for B.J. on this IEP focused upon speech and language skills as well socialization/play skills, and related services were provided under R 340.1745 and R 340.1755 (Parent Exhibit 2).

In March of 1994, B.J. was diagnosed as autistic by Dr. Luke Y. Tsai, M.D., an attending physician at the University of Michigan Adult/Child Psychiatric Hospitals. One of B.J.'s teachers from the Willow Run School District was present for part of the time, and she was aware of the diagnosis -- as was Mrs. Burilovich (Parent Exhibit 3).

Considerable time and testimony during this due process hearing was directed towards whether the school district had obtained the medical records via Mrs. Burilovich and whether they might have been used to alter program efforts.

It is noteworthy that on an IEPC conducted at the Lincoln Consolidated School District on

October 10, 1994, B.J. was again found eligible under as Pre-Primary Impaired under R 340.1711. He was just under four (4) years of age at this time. For all practical purposes, the goals and objectives again focused upon Speech and Language as well as following classroom routine. Bradley was to attend the PPI program two and one half (2 ½) hours a day, four (4) days a week. Direct Speech and Language Therapy R 340.1745) was to be provided from 40-80 minutes per week. Mrs. Burilovich signed the IEPC document in agreement and she did not contest PPI eligibility.

Pre-Primary Impaired, as defined, means a child through 5 years of age. While it does not preclude identification of a child through other criteria, R 340.1703 to R 340.1710 or R 340.1713 to R 340.1715), the Rules do not require it either.

It is highly unlikely that a reclassification of B.J. Burilovich as autistic would have altered his needs or elicited a different program. Concomitantly, Mrs. Burilovich was a part of the decision making process and signed in agreement. (Earlier in this decision, this hearing officer found no violation pertaining to parental notification of procedural rights. . . See Decision 2.1).

2.3. Issue of parental inclusion and involvement in the IEPC process.

2.3. Decision This hearing officer finds that there were violations regarding parental involvement in the IEPC process.

Implication:
2.3.a. The IEPC of May 17, 1996 is invalidated.
2.3.b. The burden of proof is shifted from the parents to the school district.

2.3.Rationale One of the concepts contained with IDEA is full parental participation. To make this parental participation a reality, the statute provides the due process procedures to assure parental participation (20 U.S.C. 415; 34 CFR 345). Parental participation is also clearly mandated under MMSEA.

In the Board of Education v Rowley, EHLR 553:656 (US, 1982), the U.S. Supreme Court determined a two step sequence to ascertain the appropriateness of an IEP: the first addressed whether the school district had complied with IDEA procedures in developing the IEP; and the second, asked whether the IEP reasonably calculated to enable the student to receive educational benefits. Clearly, the school district did not comply with first step regarding procedural safeguards in developing

the May 17, 1996 IEPC. There is no dispute that the school district failed to invite the parents to meetings which were held on April 16, 1996 and April 26, 1996. One of these meetings was even referred to as an IEPC (HO Exhibits 16, 17, 18, 19). More importantly, there were major changes in the IEP program elements for B.J. Burilovich (See Parent Exhibits 19, 24, 26, 28, 29) (Transcript Vol. 7, pp. 1343-1380) (Parent Exhibit Audiotape). Mr. and Mrs. Burilovich were not invited nor present when these proposed changes were made. Concomitantly, there is no indication how much (if any) consideration was given to the DTT program B.J. was receiving at home.

Representatives for the school district have characterized their meetings as "routine" to address "programmatic" issues; however, this hearing officer cannot ascribe to that characterization, since significant changes materialized/emanated from them!

3.0. Issue: Was a verbal contract/agreement on an IEP broken?

3.0. Decision A verbal contract/agreement on an IEP has been broken.

3.0. Rationale Perhaps just as significant to this hearing officer as the lack of adherence to procedural safeguards is the concept of PROMISSORY

ESTOPPEL. The elements of Promissory Estoppel are:

1. a promise;
2. that the promisor reasonably should have expected to induce action of a definite and substantial character on the part of the promisee;
3. which in fact produced reliance or forbearance of that nature, and;
4. in circumstances requiring that the promise be enforced if injustice is to be avoided.

(Parkhurst Hanes, Inc. v. McLaughlin, 187 Mich. App. 357, 360, 466 N.W. 2d 404 - 1991).

3.0. Discussion:

Earlier in this document, Mr. Ronald Greiner's roles as a consultant and administrator in special education were reviewed (Also refer to Transcript, Vol. 4, pp. 775-778). As the Director of Special Education for the Lincoln Consolidated School District, he had the authority to bind the district to an IEP (Transcript, Vol. 6, p. 1222). Testimony also indicated that Mr. Greiner considered himself well qualified as an educator who had extensive experience with autism (Transcript Vol. 4, pp. 807- 819).

In conjunction with his authority as an administrator and with his experience as a special educator, Mr. Greiner proposed a program for B.J. Burilovich at the March 18, 1996 IEPC which Mr. and Mrs. Burilovich

accepted. This agreement is a matter of record and was cited earlier in this decision. At this juncture, program discussions were ceased, the school staff was dismissed, and the only remaining topic, at the IEPC involved reimbursement issues. Albeit the IEP document was not signed due to the reimbursement issue, there was agreement upon the program. (Moreover, what currently constitutes an appropriate individualized educational plan for B.J. Burilovich should not be compromised by linkage to issues of reimbursement for past expenditures!) It is clear that the agreed upon program was not produced by the school district, and that a different program was presented at the May 17, 1996 IEPC.

All of the elements for promissory estoppel were/are evidenced!

GENERAL DISCUSSION

Considerable information and discussion emanated from nine days of testimony at this due process hearing. Much of the information is relegated to a secondary level due to procedural violations and this hearing officer's ruling on promissory estoppel; however, the thrust of this testimony and other issues warrants comment. It should also be noted that absent promissory estoppel, the procedural violations would still invalidate the IEP of May 17, 1996 and place the burden of proof upon the school district.

Based upon the evidence and testimony presented, the school district would not have carried the burden in convincing this

hearing officer that a Discrete Trial Training approach (as initially proposed by school personnel at the March 18, 1996 IEPC) was not appropriate for B.J. Burilovich. Neither did the testimony and evidence presented convince this hearing office that other, more appropriate programs were available.

As might be expected, well qualified witnesses for the parents such as Patricia Meinhold, Ph.D., and Peter Holmes, Ph.D., gave strong testimony in support of DTT and a behavioral approach. Another highly qualified witness for the school district, Gary Mesibov, Ph.D., favored other approaches such as TEACH, which embraced a behavioral approach as <u>one</u> of <u>multiple</u> components in a milieu setting. The testimony by school district personnel (Nichols, Senunas, Miller, Dorencamp, Stamps) tended to discredit DTT in favor of a more "eclectic" approach.

To what extent (if any) the testimony by some school district personnel was influenced by other events is difficult to discern. It should be noted that there was another recent hearing within the Intermediate School District (Martin Rennet v Ann Arbor Public Schools) in which the Ann Arbor Schools opposed DTT and the "Lovaas" approach. (Marianne Miller, who spoke to the school IEP group on April 16, 1996 about DTT and Lovaas (HO Exhibit 16) was a scheduled witness for the school district in opposition to DTT.) It was also impossible to discern what impact (if any) all of the aforementioned may have had in negating the agreed upon IEP of March 18, 1996

As a consequence of this hearing officer's rulings, these events are moot and need not be addressed.

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IV. HEARING OFFICER DIRECTIVE

A. This hearing officer is directing the Lincoln Consolidated School District to implement the proposed IEP of March 18, 1996 for Bradley (B.J.) Burilovich. Specifically, this IEP will incorporate the following elements as agreed upon by the parents and the school district:

1. B.J.'s program will consist of thirty five (35) hours of educational instruction, 30 hours of which would be provided in a discrete trial format, the balance consisting of exposure to general education.
2. The program will be implemented by two (2) paraprofessionals and one (1) back-up paraprofessional, all of whom will be trained in the implementation of DTT.
3. The paraprofessionals will work with B.J. on a one-to-one basis during his DTT sessions as well as his general education exposure.
4. There will be weekly team meetings to which the parents would be invited to participate.
5. The District will accept the goals and objectives developed by Dr. Meinhold.
6. Dr. Meinhold or another person qualified in DTT will train staff,

monitor the program, and provide oversight for the program.

7. There will be an extended school year of eight to ten weeks, with six hours per day of DTT as well as contact with non-handicapped peers.

8. There will be a transition program from a home based DTT program to a school based DTT program, the transition to occur over an eight to ten week period.

B. The Lincoln Consolidated Schools will invite the parents to participate in completing the required open components for B.J.'s program. These are specified under R 340.1721e(3) to include:

(a) A statement of the person's present level of educational performance.

(b) A statement of annual goals, including short-term instructional objectives.

(c) Appropriate objective criteria and evaluation procedures and schedules for determining whether the instructional objectives are being achieved.

(d) The extent to which the person is able to participate in regular education programs.

(e) An identification of the least restrictive environment program and related service options which were considered,

including the reasons why the options were accepted or rejected in making the decision or decisions required in subdivision (f) of this subrule.

(f) A statement of the specific special education or ancillary and other related services, or both to be provided to the person, giving consideration to the accessibility of physical facilities; transportation including the need, if any, for aids or restraints; and room and board.

(g) Beginning at age 12, a statement indicating committee consideration of prevocational/vocational education needs.

(h) The projected dates for initiation of special education programs and services and the anticipated duration of the programs and services.

C. The Individualized Educational Planning Committee (IEPC) will utilize Chapter V of the Report of the Committee on "Lovaas Style" Interventions (Parent Exhibit 46) to ascertain the completeness of the IEP Document.

D. Reimbursement

The school district will reimburse Mr. and Mrs. Burilovich for the expenses which were incurred in providing DTT at home for B.J.

from March 18, 1996 to the completion of the transition program from home training to full implementation of his IEP. (This date is yet to be determined.)

Discussion

The U.S. Supreme Court rendered a decision in Burlington School Committee v Department Of Education of the Commonwealth of Massachusetts 471 US 359, 105 S. Ct 1996, 85 L.Ed2d 385, 23 Ed Law Rep. 1189 (1985) upholding a First Circuit Court decision that IDEA allowed reimbursement to parents if the parent's selected placement was determined to be appropriate. The Court warned, however, that parents who make unilateral placements do so at their own financial risk since the reimbursement is predicated upon finding (a) the school district's IEP inappropriate, and (b) the programs and services selected by the parents were "proper under the Act", i.e., reasonably calculated to provide educational benefit.

The Burlington decision was expanded in Florence County School District v Carter, 950 3.2d156 (4th Cir. 1991) aff'd 114 S. Ct. 361 (1993) and OSEP Memorandum 94-14, 20 IDELR 1180 (1994).

This hearing officer has determined that the IEP proposed by the school district on May

17, 1996 was inappropriate, and that the services procured by the parents were reasonably calculated to provide educational benefit; consequently, reimbursement is awarded for the time frame indicated in this directive.

Prior to the March 18, 1996 IEPC meeting, the parents did not establish that school programming violated procedural safeguards nor that such programming was inappropriate. Concomitantly, Mrs. Burilovich had been a part of the decision making process as well as a factor in delaying the convening of a new IEPC (Parent Exhibits 6-12). Reimbursement for expenses incurred prior to March 18,1996 is denied.

V. FINDINGS OF FACT:

1. Bradley Burilovich meets the definition of handicapped under R 340.1715 "Autism" defined; determination of the Michigan Special Education Rules as reviewed.
2. Bradley Burilovich needs programs and services to meet his identified needs R 340.1701; R 340.1745; R 340.1749).
3. His identified needs are a matter of record.

VI. CONCLUSIONS OF LAW:

1. Bradley Burilovich is handicapped as defined under R 340.1702 and R 340.1715 of the Michigan Special Education Rules as revised, and he is eligible for Special Education programs and services.
2. The provision of appropriate educational programs and ancillary services is the responsibility of the superintendent of Lincoln Consolidated School District.
3. This decision is to be implemented immediately unless appealed or reconsidered under R 340.1725.
4. The Washtenaw County Intermediate School District is charged with the responsibility to ensure that this decision or the final decision upon appeal, has been implemented and so notify the Michigan Department, Special Education Services.

/s/_____ October 29, 1996

Henry L. Gottwald, Ed.D. Date
Professor
Special Education

Hearing Officer
State of Michigan

NOTE: This decision shall be implemented in accordance with the rules and regulations of Michigan Public Act 451 and Public Law 94-

142 and are subject to appeal by either party within 25 days as provided i R 340.1725 of Michigan Public Act 451. An appeal statement, specifying particular issues of disagreement, should be directed to:

Mr. James Rowell
Special Education Service Areas
Michigan Department of Education
P.O. Box 30008
Lansing, MI 48909

APPENDIX F

TITLE 20. EDUCATION
CHAPTER 33. EDUCATION OF INDIVIDUALS WITH DISABILITIES GENERAL PROVISIONS

20 USCS § 1401 (1996)

§ 1401. Definitions

(a) As used in this title--

(l)(A) The term "children with disabilities" means children--

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services.

(B) The term "children with disabilities" for children aged 3 to 5, inclusive, may, at the State's discretion, include children--

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) who, by reason thereof, need special education and related services.

(2) [Repealed]

(3) [Deleted]

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this title; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or Palau (until the Compact of Free Association with Palau takes effect pursuant to section 101 (a) of Public Law 99-658 *[48 USCS § 1681* note.]).

(7) The term "State educational agency" means the State board of education or other agency or officer primarily

responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which--

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-

year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: Provided, however, That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Secretary determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, the Secretary shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes

of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which the Secretary determines to be reliable authority as to the quality of education or training offered.

(F) [Deleted]

The term includes community colleges receiving funding from the Secretary of the Interior under the Tribally Controlled Community College Assistance Act of 1978.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of children with disabilities, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which

are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 614(a)(5) *[20 USCS § 1414(a)(5)]*.

(19) The term "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include--

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which

such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

(21) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting--

(A) amounts received--

(i) under this part *[20 USCS § 4000* et seq.],

(ii) under title I of the Elementary and Secondary Education Act of 1965 *[20 USCS §§ 6301* et seq.], or

(iii) under title VII of the Elementary and Secondary Education Act of 1965 *[20 USCS §§ 7401* et seq.], and

(B) any State or local funds expended for programs that would qualify for assistance under such part, chapter, or title.

(22) The term "native language" has the meaning given that term by section 7003(a)(2) of the Bilingual Education Act *[20 USCS § 3283(a)(2)]*.

(23) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to children with disabilities within that State.

(24) (A) The term "public or private nonprofit agency or organization" includes an Indian tribe and the Bureau of Indian Affairs of the Department of the Interior (when acting on behalf of schools operated by the Bureau for children and students on Indian reservations) and tribally controlled schools funded by the Department of the Interior.

(B) The terms "Indian", "American Indian", and "Indian American" mean an individual who is a member of an Indian tribe.

(C) The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act *[43 USCS §§ 1601* et seq.]).

(25) The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized,

that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

(26) The term "assistive technology service" means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes--

(A) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;

(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;

(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;

(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) training or technical assistance for an individual with disabilities, or, where appropriate, the family of an individual with disabilities; and

(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities.

(27) The term "under represented" means populations such as minorities, the poor, the limited English proficient, and individuals with disabilities.

(b) For purposes of part C of this title *[20 USCS §§ 1421* et seq.], "youth with a disability" means any child with a disability (as defined in subsection (a)(1) who--

(1) is twelve years of age or older; or

(2) is enrolled in the seventh or higher grade in school.

* * * * *

20 USCS § 1412 (1996)

§ 1412. Eligibility requirements

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 613(b) *[20 USCS § 1413(b)]* in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 [enacted Nov. 29, 1975] and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that--

(A) there is established (i) a goal of providing full educational opportunity to all children with disabilities, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities,

personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 617(c) *[20 USCS 3 § 1417(c)];* and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all children with

disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each child with a disability, and such program shall be established, reviewed, and revised as provided in section 614(a)(5) *[20 USCS 3 § 1414(a)(5)]*.

(5) The State has established (A) procedural safeguards as required by section 615 *[20 USCS § 1415]*, (B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure

shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for children with disabilities within the State, including ali such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided children with disabilities in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and (B) there are public hearings, adequate notice of such hearings, and an opportunity- for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 613 *[20 USCS 3 § 1413]*.

* * * * *

20 USCS § 1415 (1996)

§ 1415. Procedural safeguards

(a) Establishment and maintenance. Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing.

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit-

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency. If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such

review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings. Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 617(c) *[20 USCS § 1417(c)]* and shall also be transmitted to the advisory panel established pursuant to section 613(a)(12) *[20 USC5 § 1413(a)(12)]*).

(e) Civil action; jurisdiction.

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right

to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request or a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) (A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(B) (i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

(ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in section 602(a)(20) *[20 USCS § 1401(a)(20)]*.

(iii) If a parent or guardian of a child described in clause (i) requests a due process hearing pursuant to paragraph (2) of subsection (b), then the child shall remain in the alternative educational setting described in such clause during the pendency of any proceedings conducted pursuant

to this section, unless the parents and the local educational agency agree otherwise.

(iv) For the purpose of this section, the term "weapon" means a firearm as such term is defined in section 921 of title 18, United States Code.

(4)

(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if--

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure [USCS, Federal Rules of Civil Procedure, Rule 68] or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that--

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of this Act [this section].

(f) Effect on other laws. Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 *[29 USCS §§ 790* et seq.], or other

Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.

APPENDIX G

REVISED SCHOOL CODE
380.1701

ARTICLE 3

PART 29. SPECIAL EDUCATION PROGRAMS AND SERVICES; STATE BOARD

380.1701. Duties of state board

Sec. 1701. The state board shall:

(a) Develop, establish, and continually evaluate and modify in cooperation with intermediate school boards, a state plan for special education which shall provide for the delivery of special education programs and services designed to develop the maximum potential of every handicapped person. The plan shall coordinate all special education programs and services.

(b) Require each intermediate school board to submit a plan pursuant to section 1711[1] in accordance with the state plan, to be approved by the state board.

(c) Promulgate rules setting forth the requirements of the plans and procedures for submitting them.

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[1] Section 380.1711.

REVISED SCHOOL CODE
380.1711

380-1711. Intermediate school board plan for special education; implementation; expenditures, limitation

Sec. 1711. (1) The intermediate school board shall:

(a) Develop, establish, and continually evaluate and modify in cooperation with its constituent districts, a plan for special education which shall provide for the delivery of special education programs and services designed to develop the maximum potential of each handicapped person of whom the intermediate school board is required to maintain a record under subdivision (f). The plan shall coordinate the special education programs and services operated or contracted for by the constituent districts and shall be submitted to the state board for its approval.

(b) Contract for the delivery of a special education program or service, in accordance with the intermediate school district plan in compliance with section 1701.[1] Under the contract the intermediate school board may operate special education programs or services and furnish transportation services and room and board.

(c) Employ or engage special education personnel in accordance with the intermediate school district plan, and appoint a director of special education meeting the qualifications and requirements of the rules promulgated by the state board.

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[1] Section 380.17

(d) Accept and use available funds or contributions from governmental or private sources for the purpose of providing special education programs and services consistent with this article.

(e) Lease, purchase, or otherwise acquire vehicles, sites, buildings, or portions thereof, and equip them for its special education staff, programs, and services.

(f) Maintain a record of each handicapped person under 26 years of age, who is a resident of 1 of its constituent districts and who has not completed a normal course of study and graduated from high school, and the special education programs or services in which the handicapped person is participating on the fourth Friday after Labor day and the Friday before Memorial day. The sole basis for determining the local school district in which a handicapped person is a resident shall be the rules promulgated by the state board notwithstanding the provisions of section 1148.[2] The records shall be maintained in accordance with rules promulgated by the state board.

(g) Have the authority to place in appropriate special education programs or services a handicapped person for whom a constituent district is required to provide special education programs or services under section 1751.[3]

(h) Investigate special education programs and services operated or contracted for by the intermediate school board or constituent district boards and report in writing failures to comply with the provisions of a contract, statute, or rule governing the special education programs and services or with

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[2] Section 380.1148.

[3] Section 380.1751.

the intermediate school district plan, to the local school district board and to the state board.

(i) Operate the special education programs or services or contract for the delivery of special education programs or services by local school district boards, in accordance with section 1702[4], as if a local school district under section 1751. The contract shall provide for items stated in section 1751 and shall be approved by the state board. The intermediate school board shall, contract for the transportation, or room and board, or both, or[5] persons participating in the program or service as if a local school district board under sections 1756 and 1757.[6]

(j) Receive the report of a parent or guardian or, with the consent of a parent or guardian, receive the report of a licensed physician, registered nurse, social worker, or school or other appropriate professional personnel whose training and relationship to handicapped persons provide competence to judge same and who in good faith believes that a person under 26 years of age examined by the professional is or may be handicapped, and immediately evaluate the person pursuant to rules promulgated by the state board. A person making or filing this report or a local school district board shall not incur liability to a person by reason of filing the report or seeking the evaluation, unless lack of good faith is proven.

(k) Evaluate pupils in accordance with section 1311.[7]

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[4] Section 380.1702.

[5] So in original.

[6] Sections 380.1756 and 380.1757.

[7] Section 380.1311.

(2) The intermediate school board may expend up to 10% of the annual budget but not to exceed $12,500.00, for special education programs approved by the intermediate school board without having to secure the approval of the state board.

REVISED SCHOOL CODE
380.1751

380.1751. Special education programs and services; local school districts

Sec. 1751. (1) The board of a local school district shall provide special education programs and services designed to develop the maximum potential of each handicapped person in its district on record under section 1711 for whom an appropriate educational or training program can be provided in accordance with the intermediate school district special education plan, in either of the following ways or a combination thereof:

(a) Operate the special education program or service.

(b) Contract with its intermediate school board, another intermediate school board, another local school district board, an adjacent school district board in a bordering state, the Michigan school for the blind, the Michigan school for the deaf, the department of mental health, the department of social services, or any combination thereof, for delivery of the special education programs or services, or with an agency approved by the state board for delivery of an ancillary professional special education service. The intermediate school district of which the local school district is constituent shall be a party to each contract even if the intermediate school district does not participate in the delivery of the program or services.

(2) A local school district contract for the provision of a special education program or service shall provide specifically for:

(a) Special education buildings, equipment, and personnel necessary for the operation of the subject program or service.

(b) Transportation or room and board, or both, for persons participating in the programs or services as required under sections 1756 and 1757.[1]

(c) The contribution to be made by the sending local school district if the program or service is to be operated by another party to the contract. The contribution shall be in accordance with roles promulgated by the state board.

(d) Other matters which the panics deem appropriate.

(3) Each program or service operated or contracted for by a local school district shall be in accordance with the intermediate school district's plan established pursuant to section 1711.[2]

(4) A local school district may provide additional special education programs and services not included in, or required by, the intermediate school district plan.

(5) This section shall be construed to allow operation of programs by departments of state government without local school district contribution.

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[1] Sections 380.1756 and 380.1757.

[2] Section 380.1711,

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No. 00-180

IN THE

Supreme Court of the United States

EDWIN BURILOVICH and LINDA BURILOVICH, as next friends on behalf of their son BRADLEY BURILOVICH,

Petitioners,

v.

BOARD OF EDUCATION OF THE LINCOLN CONSOLIDATED SCHOOLS and RONALD GREINER, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

Elaboration and response to aspects of Petitioners' Statement of the Case is necessary. In the interest of brevity, the following paragraphs have been numbered to correspond to the paragraph designations in Petitioners' Statement of the Case.

B.J.'s IEPs and Their Development

Petition ¶2. On December 17, 1993, B.J. was found eligible for special education services, having been evaluated as "preprimary impaired" (PPI) under Michigan Administrative Code R. 340.1711. This Rule states in part that:

> "Preprimary impaired" means a child through five years of age whose primary impairment cannot be differentiated through existing criteria within R. 340.1703 to R. 340.1710, or R. 340.1713 and who manifests an impairment in one or more areas of development.

The District Court correctly noted that neither side contended that B.J. should have had any other evaluation at that time. App. 35a.[1] Moreover, the PPI classification does not require a child to be reclassified along any particular timeline. Finally, and most importantly, it is undisputed that the PPI classification did not prevent B.J. from receiving any special education programs or services deemed appropriate. Dr. Burilovich signed the December 1993 IEP in agreement. App. at 41a.

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1. All references are to the Appendix attached to the Petition for Writ of Certiorari.

In December 1995, an IEP meeting was held. For the first time, B.J.'s parents demanded discrete trial therapy (DTT) for their son. When the School District resisted this proposal, the Burilovichs issued an ultimatum that B.J. would be placed in a private program if their demands were not met. They further refused to discuss IEP goals until their demands were met. App. at 43a.

Petitioners' references to the educational proposals submitted by the School District from March-May 1996 as "IEP documents," and their assertion that the School District failed to "revise the IEP" in May 1996 are misleading, as the documents at issue were not "IEPs," and cannot be considered such as a matter of law. Pet. at 6-7. The pre-1997 IDEA defined "IEP" as a written statement developed pursuant to 20 U.S.C. § 1414. 20 U.S.C. § 1401(20). This definition has been retained at 20 U.S.C. § 1401(11). *See also Blackmon v Springfield R-XII Sch. Dist.*, 198 F.3d 648, 656-57 (8th Cir. 1999) (developing an unfinished draft IEP in advance of a meeting is "not cause for concern, as nothing in the IDEA or its regulations prohibits a school district from coming to an IEP meeting with tentative recommendations for its development prepared in the parents' absence.") The district court accordingly held that an IEP "cannot be a unilateral proposal from one member of the IEPC." The court further noted that "both sides in this case agree that a written IEP was never produced following the March IEPC." *Id.* The transactions summarized at pages 5-6 of the Petition therefore did not result in the creation of an IEP.

Administrative Hearing Before the Michigan Department of Education

***Petition* ¶4.** Michigan Administrative Code R. 340.1725(2)(c) provides that the State Hearing Review Officer (SHO) may, in addition to reviewing the record of the local hearing, "[s]eek additional evidence if necessary." In this case, neither the parties nor the SHO sought to admit additional evidence. It is further undisputed that the SHO reviews the Local Hearing Officer's (LHO's) decision on a *de novo* basis. *Id.*

Procedural History

***Petition* ¶¶5-6.** Although Petitioners primarily seek review of persuasion burdens imposed at the administrative level and the deference to be given to the final level of *de novo* administrative review, this case was resolved on summary judgment. Petitioners acknowledge that neither party submitted additional evidence to the district court, and that the matter was resolved at that level on cross motions for summary judgment. Pet. at 7. The Sixth Circuit further treated the cause as having been submitted on summary judgment. App. at 7a.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DEFERENCE TO THE SHO'S DECISIONS IS CONSISTENT WITH SETTLED PRINCIPLES OF ADMINISTRATIVE LAW, AND FAILS TO RAISE THE ISSUES PRESENTED IN THE PETITION.

The Sixth Circuit's provision of "due weight" to *decisions* made at the highest level of *de novo* administrative review comports with settled administrative law principles and the IDEA's requirements. Contrary to Petitioners' argument, the Sixth Circuit neither generally blindly defers to second-tier administrative factfinding, nor did it do so in this case. Pet. at 10-11.

This Court has held that judicial review of state administrative proceedings under the IDEA occurs under the "implied requirement that due weight shall be given to these *proceedings*." *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (emphasis added). This "due weight" standard was announced to prevent courts from substituting "their own notions of sound educational policy for those of the school authorities which they review." *Id.*

The "due weight" provided the administrative process and resultant judicial deference are decisional, not evidentiary. In other words, it goes "not to the testimony of witnesses or to the evidence — both of which the court must independently evaluate — but to the decisions of the hearing officers." *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997).

The Sixth Circuit similarly provides only decisional deference to the final level of administrative review. The Sixth Circuit in this case stated:

> The focus of the Supreme Court and this court upon the presumed educational expertise of state and local agencies leads to the conclusion that the amount of weight due depends upon whether such expertise is relevant to the decision-making process. As a result, less weight is due to an agency's determinations on matters for which educational expertise is not relevant, so that a federal court would be just as well suited to evaluate the situation. More weight is due to an agency's determinations on matters for which educational expertise would be relevant.

App. at 11a-12a. The Sixth Circuit has named this "due weight" standard "modified *de novo* review." *See Renner v. Ann Arbor Pub. Schls.*, 185 F.3d 635, 640-41 (6th Cir. 1999).

Contrary to Petitioners' argument, at no time did the courts reviewing this case hold that deference must be given to specific fact-finding at the second tier of administrative review. The lower courts neither announced nor acted upon a rule or standard conflicting with the proposition that witness testimony may not be disregarded on second-tier administrative review for unsupported "credibility" reasons. *Doyle v. Arlington County Schl. Bd.*, 953 F.2d 100, 104 (4th Cir. 1991), *Fort Zumwalt Schl. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997). *See* Pet. at 12-13. Petitioners therefore inaccurately assert that the Sixth Circuit generally, and the panel in this case specifically, defer to all aspects of final administrative review in IDEA cases. Pet. at 11-17.

Finally, the fact-bound issue underlying the Petition's first two questions was resolved by the district court's conclusion that the LHO and SHO made no conflicting determinations concerning Petitioners' expert witnesses' credibility. App. at 59a -60a. The Sixth Circuit did not conduct further review of this issue. App. at 22a.

The district court rejected as unsupported the Petitioners' argument that the SHO made witness credibility evaluations conflicting with those of the LHO. The court found that the SHO's conclusions neither contradicted the LHO's factual findings, nor contained demeanor-based determinations unsupported by the record. It reasoned as follows:

> Plaintiffs argue in their reply brief that the SHO erred in making credibility determinations of Plaintiffs' witnesses that were contrary to the LHO's determinations. *See Doyle*, 953 F.2d at 105.
>
> * * *
>
> However, in *Doyle*, the SHO made credibility determinations that were completely different from those of the LHO, when only the LHO had observed the witnesses. In this case, the LHO merely stated that these doctors were "well qualified witnesses" who gave strong testimony in support of DTT. LHO Op. at 33. The SHO determined that these witnesses may have professional or personal agendas, so he discounted their testimony. This is not in conflict with the LHO's decision, and thus does not fall under the decision in *Doyle*. The SHO is allowed to make

> credibility determinations, so long as he has a basis, and the determinations are not contrary to those of the LHO who personally observed the parties.

App at 59a-60a.

On reconsideration, Petitioners argued only that the court applied "utmost deference" to the SHO's *decision*, rather than "due weight." App. at 27a. On appeal to the Sixth Circuit, Petitioners asserted only that the district court gave undue deference to the SHO in purportedly improperly resolving a material factual question on summary judgment. App. at 22a. Disagreeing with a court's conclusions, however, does not demonstrate the existence of material factual issues. *Dong v. Board of Educ. of the Rochester Comm. Schls.*, 197 F.3d 793, 799 (6th Cir. 1999). The court found Petitioners' argument unsupported by the record, finding that no material factual dispute existed. App. at 22a. Specifically, the Sixth Circuit gave "due weight" to the SHO's educational decision, which discounted (but did not discredit) the opinions offered by one of Petitioners' experts. *Id.*

The Sixth Circuit's analysis is well supported by the administrative record. The SHO expressly acknowledged in his opinion that he was to give deference to the LHO's findings of fact, "*unless* the non-testimonial, extrinsic evidence in the record will justify a contrary conclusion, or unless the record read in its entirety could compel a contrary conclusion." App. at 73a (emphasis in original; citations omitted). Simply stated, the SHO reached an educational decision by weighing the expert testimony without making "credibility" determinations on a "cold" record. This is the

very purpose of administrative review by hearing officers having specialized knowledge.

In any event, the legality of deferring entirely to credibility-based factfinding at the second level of administrative review was neither raised nor argued in this case, nor could the record support litigation or appellate review of such an issue. The Petition should therefore be denied as to the first two questions raised, because the record neither supports review of the questions, nor does the Sixth Circuit's decision raise intercircuit "conflict" considerations. Supreme Court R. 10(1)(a).

II. NEITHER THE RECORD NOR THE DECISIONS BELOW SUPPORT REVIEW OF THE ALLOCATION OF ADMINISTRATIVE AND JUDICIAL PERSUASION BURDENS.

The lower courts' disposition of this case on summary judgment renders review of allocation of administrative and judicial persuasion burdens irrelevant. In *Morton Community Unit School District No. 709 v. J.M.*, 152 F.3d 583, 587 (7th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999), the Seventh Circuit described judicial review of IDEA cases both on summary judgment and subsequent appeal as follows:

> When the district court does not receive additional evidence — when its only role is that of reviewing court — its rulings however characterized are necessarily rulings of law, which we indeed review *de novo*, just as we review a grant of summary judgment *de novo*. *See, e.g., Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994);

Law v. Medco Research, Inc., 113 F.3d 781, 783 (7th Cir. 1997).[2]

This case similarly involved only review of issues of law. No genuine issues of fact were raised. Whether persuasion burdens applicable only to trial-level (or here, to hearing-level) consideration of *disputed* facts were properly allocated is an issue not presented by this case.

The Sixth Circuit in the present matter correctly concluded that, under the above standard, Petitioner's arguments regarding allocation of the persuasion burden are irrelevant. App. at 13a, n.3. Under Fed. R. Civ. P. 56(c), the summary judgment movant always has the initial production burden. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In an ordinary case, the persuasion burden is only a factor in determining if a genuine issue exists as to whether a party may meet the "quantum and quality of proof necessary to support liability." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). This factor is, at best, of little importance in IDEA cases where the reviewing court is required to give "due weight" to the educational decisions of administrative hearing officers under the "modified *de novo*" standard of review. *See Renner, supra.*

The summary judgment standard stands in contrast to other means by which a district court may review an IDEA case without conducting a trial. A district court may decide an IDEA case upon a closed record, although such review cannot appropriately be considered a summary judgment proceeding under Fed. R. Civ. P. 56. *Dong, supra*, 197 F.3d

2. The Seventh Circuit, consistently with *Rowley's* dictates, applies this standard while providing "due deference" to the hearing officers' decisions. *Id.*

at 798, *Doe v. Metropolitan Nashville Pub. Schools*, 133 F.3d 384, 387 n.2 (6th Cir.), *cert. denied*, 525 U.S. 813 (1998). Under such circumstances the standard of review is analogous to that applied to bench trials conducted on a stipulated record. *See Doe*, *supra*.

It is undisputed that the district court decided this case based upon the parties' cross-motions for summary judgment. Pet. at 7. The Sixth Circuit reviewed the case "as having been submitted on summary judgment," since Petitioners disputed that the district court had decided the case upon a closed record. App. at 7a. The court accordingly applied "modified *de novo*" review, giving more weight to administrative determinations on matters involving educational expertise, while at the same time ensuring that "there are no genuine issues regarding the facts essential to the hearing officer's decision." App. at 11a-13a. Analysis of persuasion burdens applicable to trial-level consideration of *disputed* facts was therefore unnecessary.

Even if relevant, persuasion burden allocation in this case is immaterial. The SHO aptly noted that "[e]ven if the District bore the burden of proof in this matter, the District's burden would have been to show that the program contained in the 5-17 IEP was appropriate." App. at 111a. The Respondents met this hypothetical burden, as the SHO found that "the challenged IEP is both valid and appropriate, and includes the maximum potential and [least restrictive environment] standards." *Id.* at 177a.

The district court, finding no conflicting facts or credibility determinations at the administrative level, gave this finding "due weight," concluding that:

> [T]he District's program was better designed to develop B.J.'s maximum potential than the more restrictive 40-hour, 1:1, DTT program proposed by Dr. Meinhold, and thus, constituted a free appropriate public education under the IDEA. The SHO's findings were well supported by the evidence on the record, and "findings of fact by a hearing officer made in a regular manner and with evidentiary support are entitled to presumptive validity." *Doyle v. Arlington Co. Schl. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991).

App. at 57a.

The Sixth Circuit affirmed, agreeing that the SHO's decision was entitled to "due weight," and emphasizing this Court's holding that the judiciary should not "substitute their own notions of sound educational policy for those of the school authorities which they review." App. at 24a, *quoting Rowley, supra*, 458 U.S. at 206. Respondents would therefore have prevailed in this case, regardless of who bore the persuasion burden.

The cases Petitioners cite from circuits placing the persuasion burden on defending school districts at various stages of IDEA proceedings do not contradict this conclusion. *See E.S. v. Independent Schl. Dist. No. 196*, 135 F.3d 566 (8th Cir. 1998) (review of district court judgment on the record), *Clyde K. v. Puyallup Schl. Dist. No. 3*, 35 F.3d 1396 (9th Cir. 1994) (district court rendered judgment after hearing additional testimony), *Walczak v. Florida Union Free Schl. Dist.*, 142 F.3d 119 (2d Cir. 1998) (review of summary judgment with no analysis of persuasion burdens), *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3d Cir. 1995),

cert. denied, 517 U.S. 1135 (1996) (review of district court hearings and remands to the administrative level); *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993) (review of district court bench trial).

Allocation of the persuasion burden is both irrelevant and immaterial in this summary judgment case, regardless of any intercircuit conflicts concerning this issue. The lower courts properly found no genuine issues of material fact, giving "due weight" to the SHO's educational decision that, regardless of the burdens applied, the Respondents had proven their proposed program was appropriate, and met the IDEA's requirements. The record of this case therefore cannot support review of Petitioner's third question.

A. Michigan's Substantive Special Education Standards Are Irrelevant To Persuasion Burden Allocation.

Contrary to Petitioners' argument, substantive, qualitative special education standards are unrelated to procedural persuasion burden issues. Pet. at 20-22. Their argument provides no basis upon which to review persuasion burden allocation.

Persuasion burdens focus upon the *process* by which courts review cases, not the underlying substantive legal standards. Petitioners' argument to the contrary conflates the concepts of substantive statutory standards and the procedures by which compliance with those standards are judicially reviewed.

The Sixth Circuit recently correctly rejected, in *Dong v. Board of Educ. of the Rochester Comm. Schls.*, *supra*, 197 F.3d at 799, an argument identical to that made by Petitioners. The court held:

> This argument . . . confuses the substantive requirements necessary to satisfy the IDEA with the question of which party bears the burden of proof.
>
> The confusion is demonstrated by Plaintiffs' reliance on the discussion in *Tucker by Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998), indicating that since an appropriate education does not mean "absolutely best" or "potential-maximizing" education, the court's review must focus on whether the proposed placement was reasonably calculated to provide educational benefits. This discussion concerned the substantive requirements of the IDEA, not the burden of proof. In fact, this Court rejected a similar claim in *Cordrey [v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990)], in which the parents argued that the burden of proof with respect to procedural compliance should lie with the School District because an IEP's procedural compliance must be subjected to "strict review."*See also Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994) (burden on party challenging administrative ruling).

Petitioners further base their argument upon an ill-defined, illusory standard. Mich. Comp. Laws Ann. § 380.1701 provides for "delivery of special education programs and services designed to develop the maximum potential of every handicap person." The Sixth Circuit recently recognized that:

> "The term 'maximum potential' has not been well-defined in Michigan law. Further, the standard may be more precatory than mandatory; it does not necessarily require the best education possible." *Brimmer v Traverse City Area Public Schools*, 872 F. Supp. 447, 454 (W.D. Mich. 1994). Michigan standards, moreover, do not require "a model education, adopting the most sophisticated pedagogical methods without fiscal or geographic constraints . . . ." *Barwacz v. Mich. Dept. of Edu.*, 674 F. Supp. 1296, 1302 (W.D. Mich. 1987). Plaintiffs concede as much, and that the interpretation of the standards is left in the reasonable discretion of the state officials dependent upon the circumstances of the case.

Renner v. Ann Arbor Pub. Schls., *supra*, 185 F.3d at 645.[3] Michigan's purported "heightened standard" provides no basis upon which to argue that the persuasion burden should be shifted to school districts in IDEA cases.

Petitioners' efforts to homogenize substantive and procedural standards is meritless, and fails to render the record susceptible to review of the alleged intercircuit conflict concerning IDEA persuasion burden allocation. Petitioners' third question is therefore unsupported by the record, and is inappropriate for review by this Court.

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3. Petitioners' counsel in this case represented the Plaintiffs in *Renner*, *supra*.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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No. 00-180

IN THE
SUPREME COURT OF THE UNITED STATES

Edwin Burilovich and Linda Burilovich
as next friends on behalf of their son,
Bradley Burilovich,
Petitioners,

v.

Board of Education of the Lincoln Consolidated Schools
and Ronald Greiner, individually,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN REPLY

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INTRODUCTION

Petitioners have requested that the Court grant a writ of certiorari to resolve a split among the circuits regarding the standard of deference to be afforded by the courts to each level of administrative review in a case brought under the Individuals with Disabilities Education Act, 20 USC §1408 *et seq.* ("IDEA"), and that the Court determine whether summary judgment is appropriate based on deference to an administrative hearing officer's findings where there were material facts in dispute before that officer and before the reviewing court. Petitioners also request that the Court review the question of which party should bear the burden of persuasion at each stage of an IDEA dispute. This Court has not addressed the issue of standards of review and burdens of persuasion under the IDEA since *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), and given the divergent approaches that have since developed within the circuits, these issues are ripe for review.

The Court's guidance on these questions is essential because the courts have developed conflicting rules and are issuing inconsistent decisions. The Sixth Circuit has adopted a rule of deference to the findings of the officer who conducts the final level of administrative review, usually a State Hearing Officer ("SHO"). The rule of deference applies even where the SHO's findings directly conflict with the findings and decisions of the Local Hearing Officer ("LHO") who actually conducted the evidentiary hearing prescribed by 20 U.S.C. §1415. This rule of deference has the effect, as in this case, of allowing the SHO to determine the existence and appropriateness of an Individualized Education Program ("IEP"), without holding a hearing and regardless of the existence of any disputed issues of fact. This rule is directly in conflict with the rules adopted by the Third, Fourth,

Eighth, and Tenth circuits that provide for at least some measure of deference to the findings of the officer who conducts the hearing. Pet. at pp. 12-14.

There is also a split among the circuits regarding which party is properly allocated the burden of persuasion in the various stages of an IDEA dispute. The Sixth Circuit has taken the position that the party challenging the IEP (usually the parents of the disabled student) must bear the burden at all stages of administrative and judicial review. This rule is directly in conflict with the rules of four other circuits, which place the burden (at least at some stage of the proceedings) on the school district to justify the appropriateness of the proposed IEP.

It is essential that the Court provide guidance to the courts below on these topics. The facts of this case make clear that the approach adopted by the Sixth Circuit can lead to an unjust result.

REBUTTAL TO RESPONDENTS' COUNTER-STATEMENT OF THE CASE

Respondents' Brief In Opposition (hereinafter, "Opp.") mischaracterizes and misrepresents material aspects of the record in this case. A few brief comments are necessary in order to clarify the record.

Respondents are simply incorrect in their statement that the December, 1995 IEP meeting was the "first time" that the Petitioners requested that the District include Discrete Trial Training (DTT) in their autistic son's educational program. Opp. at p. 2. The record is clear that over one year earlier, at the October 5, 1994 IEPC meeting, Petitioners

requested that the District provide DTT as a part of BJ's IEP. Petitioner's request was denied. App. at 42a.

Respondents also mischaracterize the ramifications of the District's lengthy delay in reclassifying BJ as autistic. First, the failure to reclassify a disabled student is a procedural violation of a student's rights under the IDEA. *See Metropolitan Nashville & Davidson County Schl. System v. Guest,* 900 F. Supp 905, 908 (M.D. Tenn. 1995). It is undisputed that the District was aware no later than June, 1994 that BJ had been diagnosed as autistic.[1] Thus, BJ no longer fit into the PPI classification which is defined as a child "whose primary impairment cannot be differentiated through existing criteria." Mich. Admin. Code R. 340.1711(1). Despite this knowledge, the District did not reclassify BJ as autistic until February 9, 1996.

Second, contrary to Respondents' assertion, it is clear that the District's nineteen-month delay in reclassifying BJ as autistic did in fact prevent BJ from receiving appropriate special education programs and services. Had BJ been appropriately reclassified by the time of the October 5, 1994 IEPC, the Committee would have considered as options the special programs and services available to children diagnosed as autistic, which are drastically different from the options available to PPI students. *See* Mich. Admin. Code R. 340.1758. These options would have included a special

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[1/] BJ's teacher, Suzanne Boyer, was present at a portion of BJ's February 24, 1994 appointment with Dr. Tsai. Dr. Burilovich hand-delivered to Ms. Boyer a copy of Dr. Tsai's evaluation and diagnosis. App. at 29. It is further undisputed that in June, 1994, Dr. Burilovich sent a letter to Willow Run District Superintendent Dr. Yomtoob relaying Dr. Tsai's diagnosis of BJ as autistic. App. at 39.

classroom for the autistically impaired, the services of a teacher certified to work with autistic children, or even integration into a mainstream preprimary program, such as a Head Start or another full-day preschool program. It will be recalled that the May 1996 IEP proposed by the District in fact removed BJ from a special education program and placed him in a mainstream classroom.

REBUTTAL TO RESPONDENTS' REASONS FOR DENYING THE WRIT

I

The Sixth Circuit's rule of deference to the findings of the SHO is in conflict with established rules in other circuits, and as applied in this case, the rule is arbitrary and leads to an unjust result.

The standard of review applied by the Sixth Circuit, and advocated here by Respondent, provides for deference to the "findings" of the hearing officer who conducted the final administrative review, which in Michigan is conducted by a SHO. Although Respondents attempt to draw a clear distinction between deference to the SHO's "decisions" and the SHO's "findings," this distinction was neither recognized nor applied by the courts below. In fact, the Sixth Circuit stated that "federal courts are generalists with no expertise in the educational needs of handicapped children and will benefit from the *factfinding* of a state agency, which is presumed to have expertise in the field." App. at 11a (emphasis added).

Further, the Sixth Circuit also held that "when there is a conflict between the holdings of the local and state

hearing officers, the court must defer to the state hearing officer's decision in reviewing the record on appeal." App. at 13a. This Court has never reviewed this standard, and this case illustrates the injustice that can result from its application.

Deference in this case resulted in the affirmation of the SHO's complete reversal of the LHO's hearing-based findings, including the LHO's determination of the credibility of Petitioners' expert witnesses. The LHO had found that Petitioners' expert witnesses, Dr. Patricia Meinhold and Dr. Peter Holmes, were "well qualified witnesses" who "gave strong testimony in support of DTT and a behavioral approach." App. at p. 248a.

Respondents argue that the SHO did not overturn the LHO's witness credibility findings, but rather, "the SHO reached an educational decision by weighing the expert testimony without making 'credibility' determinations on a 'cold' record." Opp. at p. 7. Respondents must torture the record to reach this absurd result. That the SHO clearly made a credibility determination with respect to both of the expert witnesses who testified in front of the LHO, Dr. Patricia Meinhold and Dr. Peter Holmes, is evidenced by the following excerpt:

> the SHRO discounts the testimony of both doctors (Meinhold and Holmes), ***finding them more motivated by a professional and/or personal agenda rather than having been derived from fact specific inquiries into what constitutes an IEP for BJ***.

App. at 98a (emphasis supplied). Making determinations about the "motivations" and "personal agenda" of a witness

cannot be characterized as anything other than an assessment of the witness's credibility. Additionally, the SHO went on to reject virtually all of the program features recommended by Dr. Meinhold and Dr. Holmes. App. at pp. 180a-188a.

In a footnote to their Brief, Respondents make the point (of dubious relevance) that Petitioner's counsel was also counsel for the parents in *Renner v. Ann Arbor Pub. Schls.*, 185 F.3d. 635 (6th Cir. 1999). Opp. at p. 14, fn. 3. Petitioners fail to mention the much more relevant point that SHO Sosnowsky and Dr. Meinhold were also involved in the *Renner* case. Moreover, they fail to alert this Court to the fact that in his decision in *Renner* SHO Sosnowsky made the following remarkably similar finding regarding Dr. Patricia Meinhold, again, without actually hearing her testimony:

> the SHRO discounts her views, ***finding them more motivated by a professional or personal agenda rather than having been derived from fact specific inquiries into what constitutes a FAPE for Martin***.

Plaintiff's May 11, 1998 Brief in Support of Motion for Reconsideration at p. 4 (emphasis supplied).

These statements not only illustrate the fact that SHO Sosnowsky has at least twice overruled an LHO's findings regarding the credibility of expert witnesses whose testimony he had never heard, but they also highlight the injustice that can occur when deference is given to the findings and decisions of a hearing officer who had no exposure to the witnesses, and who clearly had a pre-existing agenda of his own. The idiosyncratic style of this SHO is hardly surprising, given the process of selecting State Hearing Officers in Michigan.

In selecting SHOs, the Michigan Department of Education uses the criteria set forth by the Michigan Department of Management and Budget for the bidding of private contracts, which requires that "The Department [of Education] is directed to contact the lowest bidder first." Plaintiff's May 11, 1998 Brief in Support of Motion for Reconsideration at pp. 1-3. Here, William P. Sosnowsky was the low bidder, and he received the contract for the review of LHO Gottwald's decision in this case.

Given the fact that states enjoy great latitude in selecting SHOs, there is reason to give careful consideration to the level of deference to be accorded to the SHO's findings and decisions. The Sixth Circuit rule which defers to an SHO's findings over the findings of the LHO, who actually had the opportunity to observe the demeanor of the witnesses, makes no sense and is unfair especially when applied in the context of the Michigan SHO selection system.

Further, the district court's finding that there was no conflict between the SHO's and the LHO's findings, and the Sixth Circuit's statement that the SHO merely "discounted" but did not "discredit[]" the expert's opinions[2] are belied by this record. Their analysis is the direct result of each court's effort to adhere to an arbitrary rule of deference to the findings of an SHO under circumstances where the SHO and the LHO reach diametrically opposed conclusions.

Based on the standard of deference to the SHO, the district court inappropriately granted summary judgment where there were significant disputes of material facts not

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[2]/See Opp. at pp. 6-7.

only between the parties but also between the findings of the LHO and the SHO.

Contrary to Respondents' assertion, the legality of the Sixth Circuit rule of deference to the findings of the SHO was raised by Petitioners in both the District Court and the Sixth Circuit. App. at 13a fn 2, 27a, 49a. Respondents do not deny the existence of a circuit split on this issue, and the fact that the Fourth Circuit reached the exact opposite result in *Doyle v. Arlington County Schl. Bd.*, 953 F.2d 100 (4th Cir. 1991), a case factually analogous to this case, shows the extent of the division between the circuits on this issue.

II

There is a clear split among the circuits regarding the allocation of the burden of persuasion in an IDEA case, and as in this case, it is a critical issue.

Respondents also do not dispute the existence of a split among the circuits regarding which party should bear the burden of persuasion in the various stages of administrative and judicial review of disputes under IDEA. Instead, Respondents argue that because the case was decided below on summary judgment, the allocation of burdens is irrelevant. Opp. at p. 8. Given the Sixth Circuit's rule of deferring to the findings of SHOs, this statement could not be further from the truth.

At the administrative review level, the allocation of the burden of persuasion determines the question that the administrative hearing officer is charged to answer, and it is thus inextricably intertwined with the hearing officer's decisions and findings which are subsequently afforded

deference by the courts. It is the difference between the hearing officer inquiring as to whether the parents have proven that the IEP offered by the District is inappropriate, versus whether the District has proven that the IEP it offered is appropriate. These are extremely different inquiries, and different factual findings and legal analysis accordingly will be required.

The difference in the inquiries required by these different burdens is clear from the findings of the SHO in this case. Since the SHO placed the burden on the parents to prove that the District's proposed May 1996 program was inappropriate, the majority of the SHO's findings focused on reasons for rejecting the program advocated by the parents and on criticism of the evidence and testimony offered by the parents. App. at 170a-173a; 178a-184a. The SHO did very little to try to identify what type of program would help maximize BJ's educational potential.

It is ludicrous for Respondents to suggest that the SHO's conclusory recital that "the challenged IEP is both valid and appropriate" makes the burden of proof issue moot and therefore not open to review. Opp. at p. 10. The SHO made very few findings of fact regarding the basis for his assertion, mostly consisting of unsupported statements to the effect that the District's proposed plan met state regulatory standards. App. at 186a. The SHO also listed the services and goals included the plan without any discussion as to whether or how the proposed services would help BJ achieve the stated goals, or how the plan would help BJ "achieve his maximum potential." App. at 185a-87a.

On judicial appeal of the administrative findings, even if the district court resolves the case on summary judgment, the burden of persuasion is still crucial because, as stated in

the Petition, the standard for ruling on a motion for summary judgment necessarily implicates the substantive standard of proof that would apply at a trial on the merits. Pet. at p. 22. The Court of Appeals also underestimated the importance of the burdens below, as its own opinion plainly relies heavily on the assumption that it is petitioners' responsibility to identify the deficiencies in the program proposed by the District, rather than the District's task to establish that it has proposed an appropriate program. App. at 22a-24a.

Further, as stated in the Petition and as recognized by the Second, Third, Eighth and Ninth circuits, placing the burden of proof on the parents in an IDEA case is not appropriate and runs contrary to the purpose behind the statute. Pet. at pp. 18-21. This is especially true in a state like Michigan which imposes a higher substantive standard on Districts, placing the responsibility on the Districts to propose educational programs "designed to develop the maximum potential" of their resident disabled children. M.C.L. 380.1701(a), 380.1711(1), 380.1751(1) (App. at 277a-283a). Respondents belabor the point that the Sixth Circuit has rejected this argument but then fail to address the policy-based reasons for disregarding the Sixth Circuit's approach, which cannot be reconciled with the rules of other circuits.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, Petitioners respectfully request that the petition for a writ of certiorari be granted.

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